No. 80-195

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

METROMEDIA, INC.,

Appellant,

v.

CITY OF SAN DIEGO, a municipal corporation, and DOES I through XX, inclusive,

Respondents.

PACIFIC OUTDOOR ADVERTISING CO., INC.,

Appellant,

v.

THE CITY OF SAN DIEGO, a municipal corporation, THE CITY COUNCIL OF SAN DIEGO, VOYD BEIGHTS, Zoning Administrator of the City of San Diego and DOES 1 through 10, inclusive,

Respondents.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

JURISDICTIONAL STATEMENT

FLOYD ABRAMS
SUSAN E. FINE
MARTHA A. SCARF
CAHILL GORDON & REINDEL
80 Pine Street
New York, N. Y. 10005
(212) 825-0100

THEODORE B. OLSON
WAYNE W. SMITH
GIBSON, DUNN & CRUTCHER
515 South Flower Street
Los Angeles, Cal. 90071
(213) 488-7000

Attorneys for Appellants

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Questions Presented

1. May the City of San Diego, consistently with the First and Fourteenth Amendments to the United States Constitution, eliminate and totally prohibit all outdoor advertising within the City when, pursuant to stipulated facts, (a) outdoor advertising exists only in areas of San Diego zoned for commercial and industrial purposes; (b) outdoor advertising is a distinct means of communication and medium for the expression of ideas and a forum for the communication of messages to the public; and (c) outdoor advertising communicates valuable commercial, political and social information which many businesses, politicians and other persons rely upon because other forms of advertising are insufficient, inappropriate and prohibitively expensive?

2. May the police power of the City of San Diego be utilized, consistently with the Fourteenth Amendment to the United States Constitution, to eliminate and totally destroy the legitimate and lawful business of outdoor advertising which has been conducted within San Diego for over 60 years, in the absence of any factual demonstration that such destruction is required to serve the needs of public health, safety or welfare?

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IN THE

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October Term, 1980

METROMEDIA, INC.,

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v.

CITY OF SAN DIEGO, a municipal corporation, and DOES I through XX, inclusive,

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THE CITY OF SAN DIEGO, a municipal corporation, THE CITY COUNCIL OF SAN DIEGO, VOYD BEIGHTS, Zoning Administrator of the City of San Diego and DOES 1 through 10, inclusive,

Respondents.

Opinions Below

The Memorandum of Intended Ruling of the Superior Court, County of San Diego, State of California and Order enjoining enforcement of San Diego Ordinance No. 10795 are unreported. Copies are contained in the Appendix commencing at 81a. The opinion of the Court of Appeal, Fourth Appellate District, was issued on February 11, 1977, was reported at 67 Cal. App. 3d 84, 136 Cal. Rptr. 453, and was vacated by the action of the California Supreme Court in granting a hearing. It is contained in the Appendix at 65a.

An opinion of the Supreme Court of California initially issued on March 21, 1979 was reported at 23 Cal. 3d 762, 592 P.2d 728, 154 Cal. Rptr. 212. A petition for rehearing was granted on May 23, 1979 (having the effect of vacating the March 21, 1979 opinion) and the opinion of the Supreme Court of California on rehearing was issued on April 14, 1980, as modified on denial of further rehearing on May 14, 1980. It is reported at 26 Cal. 3d 848, 610 P.2d 407, 164 Cal. Rptr. 510 and is contained in the Appendix at 1a.

Jurisdiction

The subject of this case is the constitutionality of an ordinance adopted by the City of San Diego, California, which would totally eliminate and destroy the entire outdoor advertising industry within the city limits. In an opinion dated April 14, 1980, as modified on denial of rehearing on May 14, 1980 (A. 1a, 64a),* the Supreme Court of California held San Diego Municipal Ordinance No. 10795 (New Series) constitutional. A Notice of Appeal was filed on July 25, 1980, a copy of which is set forth at 102a of the Appendix.

Jurisdiction of this Court to review the final judgment of the Supreme Court of California is conferred by 28 U.S.C. § 1257(2) (1976).

Constitutional and Statutory Provisions

Relevant portions of the First and Fourteenth Amendments to the United States Constitution and the entirety of San Diego Municipal Ordinance No. 10795 (New Series) are set forth in the Appendix commencing at 104a.

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* References to "A. —" are to the appropriate pages of the appendix of this Jurisdictional Statement.

Statement of the Case

A. *The Stipulated Facts*

The parties—the City of San Diego and appellants—have stipulated to the basic facts which govern the disposition of this litigation.* Those facts may be summarized as follows:**

1. The City of San Diego

San Diego is the second most populous city in California (A. 120a, JS 3) and the center of government for a county containing one and one-half million people. (A. 120a, JS 4) The City covers 320 square miles (A. 120a, JS 5), larger than the combined sizes of Atlanta, Cleveland, Pittsburgh and Miami and over four times the size of the District of Columbia, *Rand McNally & Co., 1979 Commercial Atlas & Marketing Guide* 55-58 (110th ed. 1979).

San Diego is "multi-faceted, containing beaches, hills, residential areas, parks, a major seaport and naval base, a substantial commercial area, hundreds of miles of streets, highways and freeways, a large industrial area, a major

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* Under California law, both the parties and the courts are bound by the terms of the stipulation. *Greatorex* v. *Board of Administration*, 91 Cal. App. 3d 54, 58, 154 Cal. Rptr. 37, 39 (4th Dist. 1979); *Capital National Bank* v. *Smith*, 62 Cal. App. 2d 328, 343, 144 P.2d 665, 673 (3d Dist. 1944). This Court has, of course, frequently relied upon stipulations of fact. *See, e.g., Lewis* v. *BT Investment Managers, Inc.*, 100 S. Ct. 2009, 2014 (1980); *Andrus* v. *Utah*, 100 S. Ct. 1803, 1805 (1980); *Committee for Public Education and Religious Liberty* v. *Regan*, 100 S. Ct. 840, 848 n.5 (1980); *Mackey* v. *Montrym*, 443 U.S. 1, 9 (1979); *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 436, 452 n.17 (1979).

** The Joint Stipulation of Facts is set forth at A. 119a as Appendix H to this Jurisdictional Statement. References to "A. —, JS —" are to the appropriate page of the Appendix and paragraph number of the Joint Stipulation. Quotations throughout the Statement of the Case are from the Joint Stipulation.

airport and numerous major industries." (A. 120a, JS 6) Its citizens find employment in all walks of life, from industry to retail sales to services. (A. 120a, JS 7) San Diego itself consists of the old and the new, the modern and the obsolete, the aesthetically attractive and the blighted. (A. 121a, JS 8)

"All of the signs owned by [appellants] in the City of San Diego are located at areas zoned for commercial and industrial purposes," areas comprising only 2.8% of the total City. (A. 123a, 121a, JS 20, 9)

2. The Business of Outdoor Advertising

Appellants are companies which have been legally engaged in the outdoor advertising business in San Diego for over 60 years. (A. 122a, 126a, JS 12, 15, 30) Appellants each own between 500 and 800 outdoor advertising displays in San Diego which are located on property leased to them for the purpose of erecting and maintaining such displays. (A. 122a, JS 13, 14) All such displays were legally erected at substantial expense, in full compliance with state and local laws. (A. 122a, JS 15, 16) While the values of individual displays vary, the range is between $2,500 and $25,000, each display having a remaining useful and substantial income-producing life in excess of 25 years. (A. 123a, 125a, JS 18, 19, 26)

Outdoor advertising signs differ in a variety of ways from on-site business signs. On-site signs advertise businesses, goods or services available on the premises. In contrast, outdoor advertising companies lease real property and erect signs thereon which are made available to national and local advertisers for commercial, political and social messages. "Outdoor advertising is different from on-site advertising in that:

> "(a) The outdoor advertising sign seldom advertises goods or services sold or made available on the premises on which the sign is located.

"(b) The outdoor advertising sign seldom advertises products or services sold or made available by the owner of the sign.

"(c) The outdoor advertising sign is, generally speaking, made available to 'all-comers', in a fashion similar to newspaper or broadcasting advertising. It is a forum for the communication of messages to the public.

"(d) The copy of the outdoor advertising sign changes, usually monthly. For example, a particular sign may advertise a local savings and loan association one month, a candidate for mayor the next month, the opening of the San Diego Zoo the third month, a new car the fourth month, and a union grievance the fifth month." (A. 123a-124a, JS 22)

3. The Nature of Outdoor Advertising

Outdoor advertising serves a wide range of social functions. As noted, "[i]t is a forum for the communication of messages to the public." (A. 123a-24a, JS 22(c)) It is, as well, "a means of communication and a media for the expression of ideas." (A. 123a, JS 21)

"Outdoor advertising is available for all forms of advertising messages. For example, it has been used in the City of San Diego to advertise national and local products, goods and services, new products being introduced to the consuming public, to publicize the 'City in motion' campaign of the City of San Diego, to communicate messages from candidates for municipal, state and national offices, including candidates for judicial office, to propose marriage, to seek employment, to encourage the use of seat belts, to denounce the United Nations, to seek support for Prisoners of War and Missing in Action, to promote the United Crusade and a variety of other charitable and socially-related endeavors

and to provide directions to the traveling public."* (A. 124a, JS 23)

Appellants' "outdoor advertising displays produce income to a variety of segments of the national, state and local economy and stimulate the flow of trade and commerce. Land owners and advertising agencies receive income from outdoor advertising." (A. 125a, JS 27)

"Outdoor advertising increases the sales of products and produces numerous direct and indirect benefits to the public. Valuable commercial, political and social information is communicated to the public through the use of outdoor advertising. Many businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitally expensive." (A. 125a-26a, JS 28)

4. Ordinance No. 10795**

On March 14, 1972, the City Council of the City of San Diego adopted Municipal Ordinance No. 10795 (New Series). (A. 120a, JS 1) The ordinance prohibits all outdoor advertising throughout San Diego. It permits only on-site signs—*e.g.*, those which designate the owner or occupant or the premises upon which a sign is placed, identifying the premises or advertising goods manufactured or produced or services rendered on the premises upon

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* Photographs of outdoor advertising displays conveying various political, community service, and public interest messages such as were viewed by the San Diego public were set forth before the California Supreme Court in a brief, *amicus curiae*, of the Pacific Legal Foundation. A number of these examples are reproduced in Appendix I at 128a. The photographs are of actual displays used in California and illustrate the precise facts to which San Diego stipulated. Some are referred to in the dissenting opinion of Justice Clark. (A. 51a)

** The text of the ordinance is set forth in Appendix G at 104a-18a.

which a sign is placed.* (A. 107a) All other signs—*e.g.*, all outdoor advertising signs—are to be removed, without compensation and at the expense of the owners, over a four-year period. (A. 107a-11a, 126a-27a, JS 34) If enforced, the ordinance will "eliminate" the outdoor advertising business in San Diego. (A. 120a, JS 2)

B. *The Litigation*

In these litigations commenced by appellants Metromedia, Inc. and Pacific Outdoor Advertising Co., Inc., and later consolidated by stipulation, an injunction was sought to enjoin enforcement of San Diego Municipal Ordinance No. 10795.

The decision of the Superior Court held the San Diego ordinance unconstitutional as an unreasonable exercise of San Diego's police power and an abridgement of appellants' First Amendment rights. (A. 81a-97a) Enforcement of the ordinance was permanently enjoined by the Superior Court. (A. 98a-101a)

The Court of Appeal, Fourth Appellate Department, unanimously affirmed, concluding that:

> "Here, we are not dealing with an ordinance which regulates or prohibits a few signs, or which affects only signs located in certain zones or areas of the City. Enforcement of the ordinance in question will require the removal of hundreds of signs having a conceded value in the millions of dollars. The facts before us indisputably show enforcement of the ordinance will bring about substantial private loss. While the stated purposes of the ordinance may be laudable, the City presents no convincing argument why the public bene-

* The ordinance contains a few partial exemptions for signs depicting premises for sale, rent or lease, depicting time, temperature or news, for bus bench and bus signs, and for temporary political campaign signs which are maintained for no longer than 90 days and are removed within 10 days after the election to which they pertain. (A. 111a-12a)

> fits sought cannot be achieved by more reasonable and less drastic measures. The stipulated facts simply do not support the proposition that all off-premise advertising signs within the City are public nuisances, or that it is reasonably necessary to remove all of them to promote safety, general economic interests, or even aesthetic values. The ordinance is too broad, too general and too inclusive. We have no doubt the enactment of the ordinance and its attempted enforcement is beyond the power of city officials and constitutes an unreasonable and arbitrary exercise of the police power." (A. 80a)

Given its conclusion that the ordinance constituted a constitutionally insupportable use of the police power, the Court of Appeal did not "consider whether the broad sweep of the ordinance also infringes upon First Amendment or Equal Protection rights or whether its amortization provisions meet constitutional standards." * (A. 80a)

The California Supreme Court reversed in an opinion joined in by four of its seven members. Rejecting the conclusion of both courts that had considered the case that San Diego had exceeded the constitutional scope of its police power, the Court concluded that the expressed purposes of "elimination of traffic hazards brought about by distracting advertising displays and the improvement of the appearance

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* Issues relating to Equal Protection and the constitutional adequacy of the amortization provisions were among a number raised by appellants at judicial levels prior to this Court. Other issues raised below included partial preemption under state law (an issue as to which the California Supreme Court, on rehearing, ruled in favor of appellants (A. 26a-39a)) and the failure of San Diego to comply with the California Environmental Quality Act. The only issues raised on this appeal are those relating to the First Amendment and police power rulings of the California Supreme Court—issues raised and pressed by appellants before all courts that have considered this litigation.

of the city" * (A. 6a-7a) were sufficient to sustain exercise of the police power.

The Court's treatment of the First Amendment issues raised by the case was ostensibly limited to the observation that the First Amendment contentions presented had, when the case was first argued before the California Supreme Court, "presented an arguable issue" but that this Court's dismissal of appeals in *Suffolk Outdoor Advertising Co.* v. *Hulse,* 43 N.Y.2d 483, 373 N.E.2d 263, 402 N.Y.S.2d 368 (1977), *appeal dismissed,* 439 U.S. 808 (1978) and other cases constituted a firm resolution by this Court "that a prohibition of off-site billboards does not violate the First Amendment." (A. 20a) The California ruling did not deal with or advert to the limited effect that this Court has often indicated that its summary dismissals are to be given** and

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* In reaching its conclusion as to aesthetic considerations, the Court was obliged to overrule one much-cited California case precisely to the contrary and to disapprove of language "contrary to the views expressed herein" in five others. (A. 18a, n.12)

** It has long been clear that while summary affirmances are dispositions on the merits, *Hicks* v. *Miranda,* 422 U.S. 332, 344 (1975), they are "not of the same precedential value as would be an opinion of this Court treating the question on the merits . . . ." *Edelman* v. *Jordan,* 415 U.S. 651, 671 (1974). *Illinois State Board of Elections* v. *Socialist Workers Party,* 440 U.S. 173, 180-81 (1979) ("summary affirmances have considerably less precedential value than an opinion on the merits."). "Indeed, upon fuller consideration of an issue under plenary review, the Court has not hesitated to discard a rule which a line of summary affirmances may appear to have established." *Fusari* v. *Steinberg,* 419 U.S. 379, 392 (1975) (Burger, C.J., concurring).

Inherently, a summary affirmance without opinion does not adequately discuss or explain the issues at hand. "[J]urisdictional statements . . . rarely contain more than brief discussions of the issues presented" and thus cannot serve as a basis for "a conclusive resolution of an important constitutional question. . . ." *Colorado Springs Amusements, Ltd.* v. *Rizzo,* 524 F.2d 571 (3d Cir. 1975), *cert. denied,* 428 U.S. 913, 916-17 (1976) (Brennan, J., dissenting). Summary affirmances lack "any substantive discussion" of the issues, *Edelman* v. *Jordan,* 415 U.S. 651, 670 (1974), and only affirm the judgment but not necessarily the reasoning

did not otherwise consider directly the First Amendment issues raised.

The majority opinion then concluded that the San Diego ordinance did not violate the California equivalent of the First Amendment in that it was an appropriate time, place and manner regulation. (A. 21a-22a) Distinguishing other means of communication which the California Supreme Court had itself held were protected by the First Amendment, the Court concluded that unlike all other means of communication, billboards constituted totally unprotected speech because they were "large, immobile and permanent." (A. 24a)

Justice Clark dissented, concluding that the statute "clearly prohibits expression of political, social and commercial thought." (A. 52a) His opinion pointed out that the majority had relied upon a number of cases decided prior to the rulings of this Court affording protection to commercial speech (A. 53a); that the majority had misread

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of the lower court, *Washington* v. *Confederated Bands and Tribes*, 439 U.S. 463, 477 n.20 (1979) (Summary affirmance "does not, as we have continued to stress . . . necessarily reflect our agreement with the opinion of the Court whose judgment is appealed. It is not at all unusual for the Court to find it appropriate to give full consideration to a question that has been the subject of previous summary action."). Thus, this Court has often afforded plenary hearing to allow "full opportunity to consider the issue," *Tully* v. *Griffin, Inc.*, 429 U.S. 68, 75 (1976), "raised and decided" by a prior summary affirmance. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 14 (1976).

Finally, summary affirmances have been narrowly interpreted to extend to only "the precise issues presented and necessarily decided," *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977), and "no more may be read into [the Court's] action than was essential to sustain that judgment." *Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 183 (1979). In the present case, the issue was by no means adequately presented to and necessarily decided by this Court in any prior ruling. This case, relating to a total ban on billboards in a major metropolitan area, differs significantly from all prior cases and thus raises a distinct and significant constitutional issue.

and misperceived the nature and effect of this Court's summary dismissal in *Suffolk* (A. 54a, n.1); and that the majority had improperly relied upon a number of entirely distinguishable cases involving billboards. (A. 55a)

Outdoor advertising, Justice Clark concluded, was entitled to the same First Amendment protection as other forms of expression. (A. 55a-58a) The majority opinion, Justice Clark argued, had failed to show that the governmental interests in aesthetics and traffic safety "outweigh[ed] First Amendment rights of plaintiffs, advertisers and the viewing public." (A. 58a) And, relying on the precise terms of the Joint Stipulation of Facts and on other materials, Justice Clark concluded that "[a]dequate alternative means of dissemination of speech are not available." (A. 60a)

Justice Richardson concurred in the judgment, sharing "some of the substantial doubts raised by the dissent of Justice Clark" (A. 48a) but believing himself bound by this Court's summary dismissal in *Suffolk*.

Justice Newman concurred, as well, but noted that he too "share[d] Justice Richardson's unease regarding the prohibition that Justice Clark finds illegal" (A. 48a) and was "not persuaded that this court should defer to city officials' views that one mode of communication in the city should be outlawed because it seems 'particularly unsightly and intrusive'." (A. 49a) However, and notwithstanding his view that "[t]he ordinance here ought to be redrafted" (A. 50a), Justice Newman joined the judgment.

The Questions Presented Are Substantial

Introduction

That the issues raised by this appeal are substantial is suggested, at the outset, by the nature of the disagreement amongst the members of the California Supreme Court itself. There is, to be sure, but one dissent, persuasive and powerful as we believe it is (A. 50a-63a); there are, as well,

two concurring opinions—one (A. 48a) which would join the dissent if freed of what it viewed as the constraint of this Court's dismissal of *Suffolk*, the other (A. 48a-50a) which, in fact, is in substantial ideological agreement with the dissent.

Nor is the division within the California Supreme Court atypical of that which has resulted in cases involving other —almost invariably lesser—bans on outdoor advertising throughout the nation.* The range of views as to the First Amendment issues in such cases is illustrated by comparison of the grudging treatment of First Amendment rights by the majority opinion in this case with the far more supportive view in cases such as *Oklahoma ex rel. Dep't of Transportation* v. *Pile*, 603 P.2d 337 (Okla. 1979), *cert. filed*, 48 U.S.L.W. 3699 (Feb. 11, 1980) and *Baldwin* v. *Redwood City*, 540 F.2d 1360 (9th Cir. 1976), *cert. denied*, 431 U.S. 913 (1977).

Similarly, the exercise of state or local police power to ban outdoor advertising has, as the majority opinion observed, sometimes been sustained. *See John Donnelly & Sons* v. *Mallar*, 453 F. Supp. 1272 (D. Me. 1978) *appeal docketed*, No. 79-1575 (1st Cir. Oct. 30, 1979); *Suffolk Outdoor Advertising Co.* v. *Hulse*, 43 N.Y.2d 483, 373 N.E.2d

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* This Court has itself previously come close to hearing cases involving bans on outdoor advertising. *See Lotze* v. *Washington*, 444 U.S. 921 (1979) (Justices White, Blackmun and Powell dissenting from dismissal of appeal); *Veterans of Foreign Wars* v. *City of Steamboat Springs*, 439 U.S. 809 (1978) (Justices Stewart, Blackmun and Powell dissenting from dismissal of appeal); *Modjeska Sign Studios, Inc.* v. *Berle*, 439 U.S. 809 (1978) (Justices Blackmun and Powell dissenting from dismissal of appeal); *Suffolk Outdoor Advertising Co.* v. *Hulse*, 439 U.S. 808 (1978) (Justices Blackmun and Powell dissenting from dismissal of appeal). Two cases are currently on the Court's docket raising similar or related issues. They are *Ackerley Communications, Inc.* v. *City of Seattle*, 92 Wash. 2d 905, 602 P.2d 1177 (1979) (*en banc*), *appeal pending*, 48 U.S.L.W. 3839 (June 16, 1980) and *Oklahoma ex rel. Dep't of Transportation* v. *Pile*, 603 P.2d 337 (Okla. 1979), *cert. filed*, 48 U.S.L.W. 3699 (Feb. 11, 1980).

263, 402 N.Y.S.2d 368 (1977), *appeal dismissed,* 439 U.S. 808 (1978); *Modjeska Sign Studios, Inc.* v. *Berle,* 43 N.Y.2d 468, 373 N.E.2d 255, 402 N.Y.S.2d 359 (1977), *appeal dismissed,* 439 U.S. 809 (1978); *John Donnelly & Sons, Inc.* v. *Outdoor Advertising Board,* 369 Mass. 206, 339 N.E.2d 709 (1975); *Moore* v. *Ward,* 377 S.W.2d 881 (Ky. 1964).

But it has, as well, been frequently held improper in a wide range of states around the nation. *See City of Naples* v. *Polk,* 346 So. 2d 1076 (Fla. App. 2d Dist. 1977); *Combined Communications Corp.* v. *City and County of Denver,* 189 Colo. 462, 542 P.2d 79 (1975); *Metromedia, Inc.* v. *City of Des Plaines,* 26 Ill. App. 3d 942, 326 N.E.2d 59 (1st Dist. 1975); *Central Advertising Co.* v. *City of Ann Arbor,* 391 Mich. 533, 218 N.W.2d 27 (1974); *Norate Corp.* v. *Zoning Board of Adjustment,* 417 Pa. 397, 207 A.2d 890 (1965); *Stoner McCray System* v. *City of Des Moines,* 247 Iowa 1313, 78 N.W.2d 843 (1956); *Central Outdoor Advertising Co.* v. *Village of Evandale,* 54 Ohio Op. 354, 124 N.E.2d 189 (C.P. 1954).

Although the instant litigation is the latest in a series which has led to such inconsistent results, it comes to this Court in a unique factual context from those decisions previously litigated. As noted, this case is before the Court on a stipulated factual record which promotes, as no other case has, reasoned decision-making based on submissions agreed upon by the parties. Those stipulations conclusively determine significant issues of fact which were at issue in other litigations—that, for example, adequate alternative means of expression are not available for many because they are "insufficient, inappropriate and prohibitally expensive." (A. 125a-26a, JS 28)

The instant case does not relate to the constitutionality of limitations imposed upon the size or shape of outdoor advertising or the amount of such advertising to be permitted within particular geographic areas; nor does it relate to efforts to restrict outdoor advertising to specific areas or to preclude it from others of special scenic beauty,

historic character or rustic nature. Instead, the San Diego ordinance is a total ban on outdoor advertising in a significantly larger and more metropolitan area than any considered or determined previously by any appellate court. Of all the cases previously before this Court—or, we believe, likely to be presented—the prohibition imposed by the second most populous city in California (and ninth in the nation) is particularly appropriate for review.

I.

The Total Ban on the Medium of Outdoor Advertising Is Violative of the First Amendment.*

At issue on this appeal is the total "elimination", as the parties have stipulated, of "a means of communication and a media for the expression of ideas." (A. 120a, 123a, 126a, JS 2, 21, 29) The parties to the litigation are not alone

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* There is a suggestion in the majority opinion that appellants lack standing to assert that the San Diego ordinance is facially unconstitutional. (A. 23a, n.14) In fact, both the loss of their right freely to disseminate information and the resulting economic harm appellants will suffer as a result of the ordinance afford ample requisite "personal stake in the outcome of the controversy" to meet this Court's tests of standing. *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). As was true of the book publisher in *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963), who had to obtain a license for the distribution of certain books, appellants will suffer "a palpable injury as a result of the [respondent's] acts alleged to violate federal law . . . ." *Id.* at 64 n.6. And since appellants assert their own right to circulate information, *see Bantam Books, Inc.* v. *Sullivan, supra; Lovell* v. *City of Griffin*, 303 U.S. 444, 452 (1938), the requirement that a petitioner "assert [its] own legal rights and interests," *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975), has also been amply met.

Moreover, when First Amendment rights of a distributor are intertwined with the rights of advertisers to disseminate information, or the public's right to receive it, this Court has permitted one party to argue on behalf of all whose rights are infringed by a statute. *See Bantam Books, Inc.* v. *Sullivan, supra; Lovell* v. *City of Griffin, supra; Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969); *Martin* v. *City of Struthers*, 319 U.S. 141, 143 (1943).

in so characterizing outdoor advertising. Outdoor advertising has been recognized by the United States Congress as one of the nation's separate and distinct "communications media" in the Federal Campaign Communications Reform Act, 47 U.S.C. § 801(1) (repealed 1974). *See also* Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431, 441(d) (1976).

Signs and billboards have, in fact, been an accepted means of communication for centuries. Ancient Egyptian obelisks, and even the famous Rosetta Stone carried advertising messages. AGNEW, OUTDOOR ADVERTISING, Chap. 2 (McGraw-Hill Book Co. 1938). The first poster printed in England in the 15th century advertised a religious law book and was posted on church doors. HOUCK, OUTDOOR ADVERTISING: HISTORY AND REGULATIONS, Chap. 2 (Univ. of Notre Dame Press 1969). Outdoor advertising, or the "poster" or "broadside", was an effective instrument of communication during the American and French Civil Wars. The medium has played a prominent role in American and European history. *See* DAVIDSON, PROPAGANDA AND THE AMERICAN REVOLUTION (Univ. of No. Carolina Press 1941); GALLO, THE POSTER IN HISTORY (American Heritage Publ. Co. 1972); HOUCK, *supra;* KLAUS, VISUAL ENVIRONMENT (Collier-McMillian Canada, Ltd. 1971). It plays one today in China as the availability of wallposters to express dissent varies in direct proportion to the degree of freedom granted the Chinese people. *Compare,* F. Butterfield, "Settling a Score with Mao," N.Y. Times, Dec. 10, 1978, § 6 (Magazine), at 44, 143 [re use of wallposters] *with* Los Angeles Times, March 24, 1979, at 1, col. 1 [re suppression of wallposters].

The banning of such a medium of communication is inconsistent with a wide range of rulings of this Court relating to other distinct forms of communication. Each form differs; but each has been held protected. When analyzing municipal restrictions on leafletting, for example,

this Court started from the presumption of its distinct value—precisely what, in fact, the parties have stipulated to in this action. In *Lovell* v. *City of Griffin*, 303 U.S. 444, 452 (1938), the consequence of protecting leafletting meant that the town of Griffin, Georgia could not even impose a conditional ban by requiring that an individual obtain a license prior to distribution. Again, in *Jamison* v. *Texas*, 318 U.S. 413 (1943), this Court first decided that constitutional protection extended to a medium—"the communication of ideas by handbills." *Id.* at 416. It then concluded that "the right to distribute handbills concerning religious subjects on the streets may not be prohibited at all times, at all places, and under all circumstances." *Id.* at 416.*

The same logic has guided the Court when other methods of distributing constitutionally protected information were threatened. In *Martin* v. *City of Struthers*, 319 U.S. 141 (1943), Justice Black isolated those factors which make door-to-door solicitation a medium—the fact that "[f]or centuries it has been a common practice"; "[t]he widespread use of this method of communication by many groups"; and its availability and importance to diverse individuals, from "the poorly financed causes" to the government, to convey a variety of ideas. *Id.* at 141, 145-46. Because of such qualities, the Court held that "stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas." *Id.* at 147.

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* *See also Hague* v. *Committee for Industrial Organization*, 307 U.S. 496, 518 (1939), in which the Court found an "ordinance absolutely prohibiting such distribution is void"; *Schneider* v. *State*, 308 U.S. 147 (1939), where faced with three ordinances that prohibited distribution and one that required a license prior to canvassing, the Court ruled that, "[a]lthough a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to . . . circulate information or opinion." *Id.* at 160.

Again, in *Saia* v. *New York*, 334 U.S. 558 (1948), the Court enumerated the unique qualities of sound trucks as a medium—their importance and acceptance as a means of communication. The Court observed that:

> "Loud-speakers are today indispensable instruments of effective public speech. The sound truck has become an accepted method of political campaigning. It is the way people are reached." *Id.* at 561.

The Court then concluded:

> "Any abuses which loud-speakers create can be controlled by narrowly drawn statutes. When a city allows an official to ban them in his uncontrolled discretion, it sanctions a device for suppression of free communication of ideas." *Id.* at 562.

In one sense, these cases may be viewed as ones involving statutory overbreadth—one of many vices of the instant ordinance. Indeed, they may be read to conclude that the total "elimination" of any distinct medium of communication is, *a fortiori*, constitutionally overbroad. *See Village of Schaumburg* v. *Citizens for a Better Environment*, 100 S.Ct. 826, 835 (1980); *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 216-18 (1975); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 612-13 (1973).

But they go farther. They are premised upon the notion that means of expressing ideas are not interchangeable. Since "words are often chosen as much for their emotive as their cognitive force," *Cohen* v. *California*, 403 U.S. 15, 26 (1971), this Court has guarded the speaker's choice of what he considers the most effective means for his communication. The speaker must have the opportunity to "reach the minds of willing listeners and to do so there must be an opportunity to win their attention," *Kovacs* v. *Cooper*, 336 U.S. 77, 87 (1949). And for each speaker, a

variety of factors, including financial constraints,* desired audience, and the message itself, combine to lead to the choice of a specific medium. In San Diego, this choice may lead police seeking higher pay to greet visitors with a billboard stating "Welcome to San Diego—Home of 1100 Underpaid Cops." (A. I) It may lead one group to propose by billboard a boycott of Shell (A. I), another to seek United States withdrawal from the United Nations (A. I). There are, to be sure, other ways to communicate. But they are not the same. For these speakers—and the multitude of commercial users of outdoor advertising—there is no adequate substitute.**

It is thus no answer to the constitutional protection afforded to each distinct medium to conclude, as did the majority opinion of the California Supreme Court, that

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* Outdoor advertising is the least expensive of the mass media for advertisers. For the year 1978, the average cost per rating point in San Diego for some of the media were as follows: for 30-second commercials on prime-time television, $65.00, and on spot television, $38.00; for 30-second commercials on spot radio, $28.00; for one page, black and white ads in weekly magazines, $83.00, and for four color ads in monthly magazines, $93.00; and for 600-line newspaper advertisements, $25.00. The average cost per rating point in San Diego for outdoor advertising for a standard, large scale showing for thirty days was, during the same time period, $6.00. "Cost per rating point" is a computation that relates costs to rating point levels—or a percentage indicating the proportion of a particular audience reached by a medium in a particular time frame—and is used by media planners as an indication of relative media efficiency. *Media Market Guide*, San Diego Market Section at 233 (Summer, 1978).

** Even those who are favored by the few exceptions in the ordinance receive only the most minimal benefits. The temporary political sign exception (A. 112a) is a useful example. Not only are those signs available only for candidates and propositions appearing on a ballot—thus barring expression of the entire remaining panoply of political views—but the "freedom" granted to candidates is that of spending $2500 to $25,000 to erect each sign structure (which must be torn down again immediately after the election).

some other medium may simply be substituted for the one at issue. In *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85 (1977), the Court, dealing with a town ordinance that prohibited the posting of real estate "For Sale" and "Sold" signs, found that "serious questions exist as to whether the ordinance 'leave[s] open ample alternative channels for communication. . . .'" *Id.* at 93. The Court concluded:

> "[A]lthough in theory sellers remain free to employ a number of different alternatives, in practice realty is not marketed through leaflets, sound trucks, demonstrations, or the like. The options to which sellers realistically are relegated—primarily newspaper advertising and listing with real estate agents—involve more cost and less autonomy than 'For Sale' signs; cf. *Martin* v. *City of Struthers*, 319 U.S. 141, 146 (1943); *Kovacs* v. *Cooper*, *supra*, at 102-103 (Black, J., dissenting); are less likely to reach persons not deliberately seeking sales information, cf. *United States* v. *O'Brien*, 391 U.S. 367, 388-389 (1968) (Harlan, J., concurring); and may be less effective media for communicating the message that is conveyed by a 'For Sale' sign in front of the house to be sold, cf. *Cohen* v. *California*, 403 U.S. 15, 25-26 (1971). The alternatives, then, are far from satisfactory." *Id.*

Nor is it any longer plausible to maintain—if it ever was—that outdoor advertising may be banned because of its significant commercial component. In this action, as Justice Clark's dissent observes, "the issue before us is not scope of permissible regulation of commercial thought." (A. 51a) In fact, the stipulation of the parties conclusively establishes that outdoor advertising in San Diego contains "valuable commercial, political and social information." (A. 125a-26a, JS 28) Any attempt to support the total "elimination" of outdoor advertising on the ground

that all such advertising is commercial is thus based on a conceded untruth.

Moreover, as this Court has recently made clear beyond peradventure, even totally commercial speech may not be suppressed unless:

> "[t]he limitation on expression [is] designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive." *Central Hudson Gas & Electric Co.* v. *Public Service Commission,* 48 U.S.L.W. 4783, 4785 (June 20, 1980).

The Court further concluded that limitations on commercial speech may be "no more extensive than necessary to further the state interest," *id.* at 4787, and consequently held unconstitutional an order barring "all promotional advertising, regardless of the impact of the . . . service on overall energy use." *Id.* at 4786.

The language of the Court in *Central Hudson* is, in and of itself, totally inconsistent with the ruling below. Regulations that flatly ban *all* outdoor advertising can hardly survive a legal test which demands that regulation of even commercial speech be "no more extensive than necessary." If nothing else, the breadth of the San Diego statute is surely "excessive"—and thus unconstitutional.*

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* Even the case most strongly relied upon in this respect by the majority opinion supports precisely the opposite conclusion. *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976), is cited and relied upon for the proposition that "the city's interest in regulating commercial use of real property outweighed the incidental effect

Nor is it an answer to such constitutional considerations to urge, as does the majority opinion, that billboards are "intrusive" and thus lose the totality of their constitutional protection. (A. 22a) This Court's decision in *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975), squarely refutes that conclusion. In *Erznoznik*, an ordinance prohibited a drive-in movie theater from exhibiting films containing nudity where the screen was visible from a public street or place. Notwithstanding that drive-in theater screens are "invariably huge" and "a unique type of eye-catching display that can be highly intrusive and distracting," 422 U.S. at 221, 222 (Burger, C.J., dissenting), and that the screen in question "dominated the view from public places including nearby residences and adjacent highways" and a church parking lot, *id.* at 207, 221, the Court rejected the notion of visual captivity in the street and placed on the individual street traveler the burden of avoiding an offending "encounter":

> "The plain, if at times disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, 'we are inescapably captive audiences for many purposes.' . . . Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit the government to decide which

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of the ordinance upon First Amendment values." (A. 24a-25a) The opinion totally overlooks the fact that *Young* involved simply a *spacing* regulation—precisely the form of regulation rejected by San Diego in favor of prohibition. The Court in *Young* expressly noted that the Detroit ordinances under consideration were "not challenged on the ground that they impose a limit on the number of adult theaters which may operate in the City of Detroit. There is no claim that distributors or exhibitors of adult films are denied access to the market. . . ." 427 U.S. at 62. *Young* thus flatly refutes the majority opinion's treatment of San Diego's ordinance since, as this Court observed, "[t]he situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech." *Id.* at 71 n.35. That "quite different" situation is presented by this case.

> types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, absent the narrow circumstances described above, the burden normally falls upon the viewer to 'avoid further bombardment of [his] sensibilities simply by averting [his] eyes.'" 422 U.S. at 210-11 (footnote omitted).

See also Consolidated Edison Co. v. *Public Service Commission*, 48 U.S.L.W. 4776 (June 20, 1980); *Spence* v. *Washington*, 418 U.S. 405, 412 (1974); *Cohen* v. *California*, 403 U.S. 15, 21-23 (1971).

Finally, the reliance by the majority on time, place and manner analysis is simply unsound. To urge that a distinct medium may be destroyed by the simple invocation of the standard tripartite time, place and manner test—content neutral regulation in furtherance of significant governmental interests with alternative sources of communication available*—is to ignore the fact that virtually any medium could be eliminated by such a test. Most efforts to destroy an entire medium would be content neutral; arguably "significant" governmental interests abound; alternative sources may, by hypothesis, always be located in the remaining media—*e.g.*, those not "eliminated". If a state sought to prohibit sound trucks, it could be said that such abolition was content neutral, supported by the significant interests of avoiding noise and enhancing personal privacy, and that alternative sources of expression —such as leaflets or outdoor advertising—were available. If all leaflets were sought to be banned on one aesthetic theory or another, the presence of "other" means of communication could be cited. Precisely the same could be said in support of the banning of any medium of communication.

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* *See e.g., Police Department* v. *Mosley*, 408 U.S. 92 (1972).

Moreover, from the face of the San Diego ordinance and the terms of the stipulated facts of this case, even a time, place and manner analysis could not justify the ban at issue here. The parties have, after all, stipulated that there are *no* adequate alternative means of serving the "many businesses and politicians and other persons" whose needs are served only by outdoor advertising;* a review of Appendix I to this Jurisdictional Statement suggests precisely the same thing. The San Diego ordinance, furthermore, clearly discriminates on the basis of content since the ordinance exempts both on-site signs and signs relating to specified subjects—*e.g.*, premises for sale, rent or lease. As for the governmental interests asserted, the record of this case is utterly barren of *any* support for the proposition that traffic safety has been diminished by the existence of outdoor advertising. (*See infra*, pp. 25-26) As for aesthetic considerations (a matter dealt with more extensively at pp. 26-27, *infra*), we need say no more now than that at least as significant governmental concerns have been held insufficient to overcome First Amendment interests. *See, e.g., Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85 (1977). Indeed, if the mere assertion of necessarily subjective aesthetic considerations could overcome the First Amendment rights of a medium of communication, more than a few media would be imperiled. Sound trucks are noisy; leaflets litter; newsracks are sometimes unsightly; drive-in theaters showing nude figures may well be deemed unseemly. The First Amendment is not so easily overcome.

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* The effort of the California Supreme Court to transform the language of the stipulation that "many businesses and politicians and other persons" rely upon outdoor advertising because other media are "insufficient, inappropriate and prohibitively expensive" (A. 125a-26a, JS 28) to "[t]he *possibility* that the ordinance *may* impede an *occasional* advertiser from communicating his message" (A. 23a n.14; emphasis added) is suggestive of the cavalier fashion with which the binding terms of the stipulation were treated throughout the opinion. *See* A. 60a-61a (Opinion of Clark, J., dissenting).

II.

The Police Power of San Diego Cannot Constitutionally Be Utilized so as to Destroy the Outdoor Advertising Business in the Absence of Proof that Continuance of the Business in its Present Form Adversely Affects the Health, Safety, or Tangible Welfare of Other Persons or Property.

Under the decision of the California Supreme Court, a long-standing legitimate business will be "eliminated" across the entirety of San Diego's three hundred and twenty square miles. (A. 120a, 126a, JS 2, 5, 29, 30) As the parties have stipulated, prior to the enactment of Ordinance 10795, outdoor advertising had been conducted in full compliance with all applicable municipal and state laws (A. 122a, JS 15) at substantial cost to the plaintiffs. (A. 122a, 123a, JS 16, 18) All of appellants' billboard displays in San Diego are located in areas zoned for commercial and industrial uses (A. 123a, JS 20) and the displays are thus a critical link in the dissemination of goods and services within areas which San Diego has itself zoned for such purposes. Almost sixty per cent of San Diego's citizens are occupied in the manufacturing, retailing, and provision of services (A. 121a, JS 10) and San Diego has itself agreed that the outdoor advertising business provides both direct and indirect benefits to the flow of trade and commerce. (A. 125a-26a, JS 27, 28) In the face of this barrage of conceded benefits, on a record devoid of evidence of any real or substantial threat to public health, safety, or welfare, San Diego's attempt to abolish appellants' long-standing, legitimate, beneficial business based upon its police power violates the due process clause of the Fourteenth Amendment.

This Court's decisions establish that regulation of the use of property is permissible under the police power; but that some alleged regulatory authority under the police

power exceeds constitutional parameters. Determination of that issue is one of reasonableness, one requiring an assessment of two components—private loss and public gain. *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590, 594 (1962).

Here, it is beyond question that the private loss appellants are asked by the City to suffer, as a cost of the destruction of their business, is enormous. Against a private loss which both parties have stipulated will range between $2,500,000 and $40,000,000 (A. 122a, 123a, JS 13, 18, 19) the constitutional question which is starkly posed is what justification, in the name of public health, safety, or welfare, can possibly be advanced by the City to make such a loss constitutionally "reasonable".

San Diego has advanced two justifications for the ordinance—traffic safety and aesthetics.* Of the first, it should suffice to say that while the opinion concludes, as a matter of law, that the ordinance reasonably relates to traffic safety, the record is precisely to the contrary: not a single motorist or pedestrian accident has ever been reported to the City of San Diego as being caused by the existence and maintenance of outdoor advertising signs. (Clerk's Transcript pp. 391-93) Indeed, counsel for the City of San Diego conceded that the "City was unaware of any particular person

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* The two are, in fact, difficult to reconcile. As the Oklahoma Supreme Court observed in *Oklahoma ex rel. Dep't of Transportation* v. *Pile,* 603 P.2d 337 (Okla. 1979), *cert. filed,* 48 U.S.L.W. 3699 (Feb. 11, 1980):

> "[T]he considerations of public safety and beauty as proffered by the state as a basis for prohibiting the speech signified by the defendant's billboard are mutually inconsistent. The argument is made that our residents are entitled to look at the beauty of the countryside, untrammeled by the blight of billboards, in the face of the statement that billboards can be banned because they constitute a distraction to the drivers of automobiles. Using this reasoning, one could argue the countryside should be covered with billboards to reduce the temptation to avert one's eyes from the road." *Id.* at 342-43.

or any particular instance, fact situation, of someone being injured in an automobile accident because of an outdoor advertising sign." * This is surely compelling evidence that, at least in the conceded absence of any factual basis to the contrary, it is far from "reasonable" to conclude that an entire and entirely legitimate business may be prohibited throughout an enormous metropolis.

Treatment of the traffic safety issue by the California Supreme Court is in marked contrast to that of this Court in *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205 (1975). If the exposure of drivers to nude bodies on a drive-in theater screen is insufficient to justify a ban allegedly based upon the needs of traffic safety, it is difficult to comprehend how the far more placid medium of outdoor advertising may be totally prohibited.**

Reliance upon the simple invocation of "aesthetics" to justify the flat ban is no more constitutionally permissible. The "architecture and historic value" of New Orleans' Vieux Carre, may, of course, be preserved on aesthetic grounds, *City of New Orleans* v. *Impastato,* 198 La. 206, 211, 3 So.2d 559, 561 (1941); so may "an historic and literary shrine of singular interest" such as Concord, *General Outdoor Advertising Co.* v. *Department of Public Works,* 289 Mass. 149, 197, 193 N.E. 799, 821 (1935). To "ensure the natural beauty" of park areas, billboards have been held excludable. *Modjeska Sign Studios, Inc.* v. *Berle,* 43 N.Y.2d 468, 473, 373 N.E.2d 255, 257, 402 N.Y.S.2d 359, 362 (1977), *appeal dismissed,* 439 U.S. 809 (1978). But in each such situation the municipality had a clearly articulated, aesthetic goal which could *only* be maintained through a total prohibition of outdoor advertising. Such a rationale becomes simply an open-ended license to destroy

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* Reporter's Transcript of Proceedings, February 28, 1975, p. 18.

** In other contexts, as well, this Court has rejected speculative claims that other protected interests should be held to yield to the supposed requirements of traffic safety. *See, Raymond Motor Transportation, Inc.* v. *Rice,* 434 U.S. 429 (1978); *Delaware* v. *Prouse,* 446 U.S. 648 (1979).

when an aesthetic justification is proposed as the basis for a flat ban on the business of outdoor advertising in the commercially and industrially zoned sectors of the second most populous city in the single most populous state in this country.

The Ohio Supreme Court aptly described, 55 years ago, the necessarily subjective and differing results occasioned by legislating in areas of personal taste: "Certain Legislatures might consider that it was more important to cultivate a taste for jazz than for Beethoven, for posters than for Rembrandt, and for limericks than for Keats." *City of Youngstown* v. *Kahn Brothers Building Co.*, 112 Ohio St. 654, 661-62, 148 N.E. 842, 844 (1925).*

One may go farther. Every election brings with it changes in the individuals who hold legislative powers and presumably the collective "aesthetic judgments" of the legislature. Ordinance 10795 was itself passed by a five to four margin. There may, in the future, be other groups of five and four on other "aesthetic" issues. To say that the canvas may be scraped clean in every election is the antithesis of the "reasonableness" that is the governing standard in this area of law.

Appellants' displays were erected under city laws which authorized their construction. They were built exactly

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* A useful example may be seen by contrasting the final quotation of the majority opinion—the Ogden Nash doggerel (A. 47a)—with the conclusion of a leading international publication of graphic arts published in Switzerland which concluded as follows:

> "Ogden Nash thought that he would never see a billboard lovely as a tree, but he might have changed his mind if he could have seen what is happening now in California. Parallel to the rise of painted walls, an attempt is being made to turn the billboard into Big Art, a movement which recently won recognition when the California Museum of Science and Industry devoted an exhibition to it." *Graphics* (No. 199, V. 34, 1978-79) p. 448.

We do not, of course, suggest that the Court should hold that Nash was, as a matter of law, incorrect: aesthetic predilections are as personal as they are evanescent. But no notion of due process can permit the destruction of a 60 year old business on such a basis.

where and how the then-existing legislatures said they could be built. To conclude that San Diego may impose a flat ban on a decades-old legitimate business in such circumstances, at enormous cost and upon no showing by the City of any tangible benefit to the public health, welfare or safety of the citizens, is constitutionally impermissible.

Conclusion

The questions presented by this appeal are substantial. Probable jurisdiction should be noted and the case set down for argument.

Respectfully submitted,

Floyd Abrams
Susan E. Fine
Martha A. Scarf
Cahill Gordon & Reindel
80 Pine Street
New York, N.Y. 10005
(212) 825-0100

Theodore B. Olson
Wayne W. Smith
Gibson, Dunn & Crutcher
515 South Flower Street
Los Angeles, Cal. 90071
(213) 488-7000

Attorneys for Appellants

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Appendices

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APPENDIX A

Opinion of the Supreme Court of California

SUPREME COURT OF CALIFORNIA

En Banc

Record No. 30782.

Metromedia, Inc.,

Plaintiff and Respondent,

v.

City of San Diego,

Defendant and Appellant.

Pacific Outdoor Advertising Company, Inc.,

Plaintiff and Respondent,

v.

City of San Diego, et al.,

Defendants and Appellants.

April 14, 1980.

As Modified on Denial of Rehearing

May 14, 1980.

Opinion by Justice Matthew O. Tobriner

The City of San Diego enacted an ordinance which bans all off-site advertising billboards and requires the removal of existing billboards following expiration of an amortization period. Plaintiffs, owners of billboards affected by the ordinance, sued to enjoin its enforcement. Upon motion for

summary judgment, the superior court adjudged the ordinance unconstitutional, and issued the injunction as prayed.

We reject the superior court's conclusion that the ordinance exceeded the city's authority under the police power. We hold that the achievement of the purposes recited in the ordinance—eliminating traffic hazards and improving the appearance of the city—represent proper objectives for the exercise of the city's police power, and that the present ordinance bears a reasonable relationship to those objectives. We reject also the lower court's alternative holding that the ordinance violates the First Amendment; judicial decisions demonstrate that a ban on commercial off-site billboards, enacted under the city's authority to regulate the commercial use of real property, does not abridge freedom of speech or press.

We agree with plaintiffs, however, that the San Diego ordinance is partially preempted by state law. By requiring uncompensated removal of billboards within 660 feet of federal interstate and primary highways, the ordinance endangers the state's share of federal highway funds; the ordinance thereby comes into conflict with provisions of the Outdoor Advertising Act (Bus. & Prof.Code, § 5200 et seq.) which require compensation when necessary to protect the state's receipt of federal monies. The ordinance's prohibition on construction of new billboards, and its provisions for uncompensated removal of billboards beyond the 660-foot limit, are not preempted by state law.

Plaintiffs also urge that we sustain the summary judgment on a variety of other grounds; they contend that it denies the equal protection of the law; that its amortization provisions are facially unreasonable; and that the city failed to comply with the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.). For the reasons

we set forth, we conclude that none of these grounds will sustain the judgment below.

We conclude that the judgment of the superior court should be reversed and the case remanded to that court for further proceedings. At that time the court may determine which if any of plaintiffs' billboards fall within the preemptive scope of the Outdoor Advertising Act and render judgment that the ordinance may not be validly applied to require uncompensated removal of such billboards.

1. *Summary of proceedings in the trial court.*

The present case concerns the constitutionality of San Diego Ordinance No. 10795 (New Series), enacted March 14, 1972. With limited exceptions specified in the footnote,[1] the ordinance as subsequently amended prohibits all off-site "outdoor advertising display signs."[2] Off-site signs are

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[1] The original ordinance permitted the following off-site signs: Signs maintained in the discharge of a governmental function; bench advertising signs; commemorative plaques, religious symbols, holiday decorations and similar such signs; signs located within shopping malls not visible from any point on the boundary of the premises; signs designating premises for sale, rent or lease; public service signs depicting time, temperature or news; signs on vehicles conforming to city regulations; and temporary off-premises subdivision directional signs.

As originally enacted, the ordinance contained no exception for political signs. On October 19, 1977, the city council amended the ordinance to permit "Temporary political campaign signs, including their supporting structures, which are erected or maintained for no longer than 90 days and which are removed within 10 days after the election to which they pertain." (Ord. No. 12189 (New Series).) This amendment may have been prompted by the decision of the Ninth Circuit in *Baldwin* v. *Redwood City* (1976), 540 F.2d 1360, in which that court held an ordinance regulating temporary signs to be an unconstitutional restriction upon political speech.

[2] The ordinance does not define the term "outdoor advertising display signs." The history of the ordinance and the arguments

defined as those which do not identify a use, facility or service located on the premises or a product which is produced, sold or manufactured on the premises. All existing signs which do not conform to the requirements of the ordinance must be removed following expiration of an amortization period, ranging from 90 days to 4 years depending upon the location and depreciated value of the sign.

Plaintiffs, Metromedia, Inc., and Pacific Outdoor Advertising Co., Inc., are engaged in the outdoor advertising business and own a substantial number of off-site billboards

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of the parties demonstrate that the purpose of the ordinance is the prohibition of commercial billboards. But although the amended ordinance excludes signs which fall within 12 specific exceptions, it fails to exclude many varieties of less obtrusive, noncommercial signs that present no significant aesthetic blight or traffic hazard. That failure, in light of the absence of a definition of the class of signs prohibited, suggests a danger that the ordinance might be construed to apply to signs of a character very different from commercial billboards—for example, to a picket sign announcing a labor dispute or a small sign placed in one's front yard proclaiming a political or religious message.

To avert that danger, and to avoid the risk of unconstitutional overbreadth which a broad construction of the ordinance might entail, we adopt a narrow construction limiting its proscription to those signs which clearly fall within the intendment of the enactment. (Cf. *Welton* v. *City of Los Angeles* (1976) 18 Cal.3d 497, 506-507, 134 Cal.Rptr. 668, 556 P.2d 1119; *Braxton* v. *Municipal Court* (1973) 10 Cal.3d 138, 144-145, 109 Cal.Rptr. 897, 514 P.2d 697.) We find such a construction in the definition of the term "outdoor advertising display" in Revenue and Taxation Code section 18090.2: "a rigidly assembled sign, display, or device permanently affixed to the ground or permanently attached to a building or other inherently permanent structure constituting, or used for the display of, a commercial or other advertisement to the public." Although that specific definition was not before the San Diego City Council when it adopted Ordinance No. 10795, incorporation of that definition into the ordinance will fulfill the city's purpose of banning permanent structures used predominantly for commercial advertising, while avoiding the constitutional issues raised by a less certain or more expansive reading of the ordinance.

subject to removal under Ordinance No. 10795. Plaintiffs filed separate actions against the city, attacking the validity of the ordinance. The actions were consolidated by stipulation.[3] After extensive interrogatories and requests for admission had been answered all parties moved for summary judgment.

To facilitate the determination of the motion for summary judgment the parties entered into a stipulation of facts. The following portions of that stipulation are particularly pertinent to the present appeal: "2. If enforced as written Ordinance No. 10795 will eliminate the outdoor advertising business in the City of San Diego. . . . 13. Each of the plaintiffs are the owners of a substantial number of outdoor advertising displays (approximately 500 to 800) in the City of San Diego. . . . 17. The displays have varying values depending upon their size, nature and location. 18. Each of the displays has a fair market value as a part of an income-producing system of between $2,500 and $25,000. 19. Each display has a remaining useful income-producing life in excess of 25 years. 20. All of the signs owned by plaintiffs in the City of San Diego are located in areas zoned for commercial and industrial purposes. . . . 28. Outdoor advertising increases the sales of products and produces numerous direct and indirect benefits to the public. Valuable commercial, political and social information is communicated to the public through the use of outdoor advertising. Many businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive. . . . 31. Many of plaintiffs' signs are within 660 feet and others are within 500 feet of interstate or federal primary high-

[3] Defendants in the consolidated action are the city, the members of the city counsel, and the city planning director.

ways. . . . 34. The amortization provisions of Ordinance No. 10795 have no reasonable relationship to the fair market value, useful life or income generated by the signs and were not designed to have such a relationship." [4]

The trial court filed a memorandum opinion stating that the ordinance was invalid as an unreasonable exercise of police power and an abridgment of First Amendment guaranties of freedom of speech and press. The court then entered judgment enjoining enforcement of the ordinance. The city appeals from that judgment.

2. *The summary judgment cannot be sustained on the ground that the San Diego ordinance exceeds the city's authority under the police power.*

The San Diego ordinance, as we shall explain, represents a proper application of municipal authority over zoning and land use for the purpose of promoting the public safety and welfare.[5] The ordinance recites the purposes for which it was enacted,[6] including the elimination of traffic

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[4] Plaintiffs filed no declaration to support the motion for summary judgment, but relied solely upon the pleadings, the city's response to interrogatories, and the agreed stipulation of facts.

[5] An ordinance restricting land use is valid under the police power if it has a real or substantial relation to the public health, safety, morals or general welfare. (*Associated Home Builders etc., Inc.* v. *City of Livermore* (1976) 18 Cal.3d 582, 604, 135 Cal.Rptr. 41, 557 P.2d 473; *Miller* v. *Board of Public Works* (1925) 195 Cal. 477, 490, 234 P. 381.)

[6] Part A of the ordinance declares: "It is the purpose of these regulations to eliminate excessive and confusing sign displays which do not relate to the premises on which they are located; to eliminate hazards to pedestrians and motorists brought about by distracting sign displays; to ensure that signing is used as identification and not as advertisement; and to preserve and improve the appearance of the City as a place in which to live and work.

"It is the intent of these regulations to protect an important aspect of the economic base of the City by preventing the destruc-

hazards brought about by distracting advertising displays and the improvement of the appearance of the city. Since these goals are proper objectives for the exercise of the city's police power, the city council, asserting its legislative judgment, could reasonably believe the instant ordinance would further those objectives.

Plaintiffs cannot question that a city may enact ordinances under the police power to eliminate traffic hazards. They maintain, however, that the city failed to prove in opposition to plaintiffs' motion for summary judgment that the ordinance reasonably relates to that objective. We could reject plaintiffs' argument on the simple ground that plaintiffs, as the parties asserting the unconstitutionality of the ordinance, bear the burden of proof (see *Associated Home Builders, etc., Inc.* v. *City of Livermore, supra*, 18 Cal.3d 582, 609, 135 Cal. Rptr. 41, 557 P.2d 473), and cannot rely upon the city's failure of proof. To avoid unnecessary litigation upon remand of this cause, however, we have probed plaintiffs' broader argument: We hold as a matter of law that an ordinance which eliminates billboards designed to be viewed from streets and highways reasonably relates to traffic safety.

Billboards are intended to, and undoubtedly do, divert a driver's attention from the roadway. Whether this distracting effect contributes to traffic accidents invokes an issue of continuing controversy.[7] But as the New York Court of

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tion of the natural beauty and environment of the City, which is instrumental in attracting nonresidents who come to visit, trade, vacation or attend conventions; to safeguard and enhance property values; to protect public and private investment in buildings and open spaces; and to protect the public health, safety and general welfare."

[7] "No matter what one's position on the sign and safety issue one can find the study to support it . . . . [D]espite the insights pro-

Appeals pointed out, "mere disagreement" as to "whether billboards or other advertising devices . . . constitute a traffic hazard . . . may not cast doubt on the statute's validity. Matters such as these are reserved for legislative judgment, and the legislative determination, here expressly announced, will not be disturbed unless manifestly unreasonable." (*New York State Thruway Auth.* v. *Ashley Motor Ct.* (1961) 10 N.Y.2d 151, 218 N.Y.S.2d 640, 176 N.E.2d 566.) Many other decisions have upheld billboard ordinances on the ground that such ordinances reasonably relate to traffic safety;[8] we cannot find it manifestly unreasonable for the San Diego City Council to reach the same conclusion. As the Kentucky Supreme Court said in *Moore* v. *Ward* (1964) 377 S.W.2d 881, 884: "Even assuming [plaintiffs] could produce substantial evidence that billboard signs do not adversely affect traffic safety, . . . the question involves

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vided by statistical analyses, the case for the hazards of private signs rests largely upon common sense and the informed judgments of traffic engineers and other experts. The arguments are complex and sometimes highly technical, but on the whole, the courts are increasingly likely to conclude that regulation of private signs may be reasonably expected to enhance highway safety." (Dowds, *Private Signs and Public Interests*, in 1974 Institute on Planning, Zoning and Eminent Domain, p. 231.)

[8] See *City of Escondido* v. *Desert Outdoor Advertising, Inc.* (1973) 8 Cal.3d 785, 790, 106 Cal.Rptr. 172, 505 P.2d 1012; *E. B. Elliott Adv. Co.* v. *Metropolitan Dade County* (5th Cir.) 425 F.2d 1141, 1152; *General Outdoor Adv. Co.* v. *Department Pub. Works* (1935) 289 Mass. 149, 171, 193 N.E. 799; *Newman Signs, Inc.* v. *Hjelle* (N.D. 1978) 268 N.W.2d 741, 757, appeal dismissed (1979) 440 U.S. 901, 99 S.Ct. 1205, 59 L.Ed.2d 449; *Opinion of the Justices* (1961) 103 N.H. 268, 169 A.2d 762; *United Advertising Corp.* v. *Metuchen* (1964) 42 N.J. 1, 4, 198 A.2d 477; *State* v. *Lotze* (1979) 92 Wash.2d 52, 593 P.2d 811, 813-814, appeal dismissed, —— U.S. ——, 100 S.Ct. 257, 62 L.Ed.2d 177; *Markham Advertising Co.* v. *State* (1978) 73 Wash.2d 405, 416, 439 P.2d 248, app. dismissed (1969) 393 U.S. 316, 89 S.Ct. 553, 21 L.Ed.2d 512.

so many intangible factors as to make debatable the issue of what the facts establish. Where this is so, it is not within the province of courts to hold a statute invalid by reaching a conclusion contrary to that of the legislature."

We further hold that even if, as plaintiffs maintain, the principal purpose of the ordinance is not to promote traffic safety but to improve the appearance of the community, such a purpose falls within the city's authority under the police power. In contending that aesthetic considerations cannot justify the exercise of the police power to prohibit billboards, plaintiffs rely on *Varney & Green* v. *Williams* (1909) 155 Cal. 318, 100 P. 867, which held unconstitutional an ordinance of the City of East San Jose prohibiting all advertising billboards. Asserting that the ordinance rested solely on the "promotion of aesthetic or artistic considerations," we stated that "it has never been held that these considerations alone will justify, as an exercise of the police power, a radical restriction of the right of an owner of property . . . ." (*Id.* at p. 320, 100 P. at p. 868, quoting *City of Passaic* v. *Patterson Bill Posting Co.* (1905) 72 N.J.L. 285, 287, 62 A. 267.)

Constrained by this precedent, subsequent California Court of Appeal decisions have stated that aesthetic considerations cannot justify an ordinance prohibiting billboards. (See *Desert Outdoor Advertising, Inc.* v. *County of San Bernardino* (1967) 255 Cal.App.2d 765, 769, 63 Cal. Rptr. 543; *County of Santa Barbara* v. *Purcell, Inc.* (1967) 251 Cal.App.2d 169, 173, 59 Cal.Rptr. 345; *National Advertising Co.* v. *County of Monterey* (1962) 211 Cal.App.2d 375, 379, 27 Cal.Rptr. 136.) Only one decision, however, has actually invalidated a city ordinance on this ground. (*City of Santa Barbara* v. *Modern Neon Sign Co.* (1961) 189 Cal.

App.2d 188, 191-194, 11 Cal.Rptr. 57.) In all other cases the courts have found some additional ground for the ordinance, such as elimination of driving hazards or promotion of tourist traffic. Relying on such additional grounds, the cases conclude that the ordinance did not become unconstitutional merely because aesthetic considerations may have played some part in motivating its enactment.[9]

Thus we could distinguish the present case from *Varney & Green* v. *Williams, supra,* 155 Cal. 318, 100 P. 867, on the ground that the present ordinance was not enacted exclusively for aesthetic purposes. We believe, however, that the holding of *Varney & Green* v. *Williams,* that aesthetic purposes alone cannot justify assertion of the police power to ban billboards, is unworkable, discordant with modern thought as to the scope of the police power, and therefore compels forthright repudiation.

Because this state relies on its scenery to attract tourists and commerce, aesthetic considerations assume economic value. Consequently any distinction between aesthetic and economic grounds as a justification for billboard regulation must fail. "Today, economic and aesthetic considerations together constitute the nearly inseparable warp and woof of the fabric upon which the modern city must design its future." (*Metromedia, Inc.* v. *City of Pasadena, supra,* 216 Cal.App.2d 270, 273, 30 Cal.Rptr. 731, 733; *Burk* v. *Muni-*

[9] See *Desert Outdoor Advertising Inc.* v. *County of San Bernardino, supra,* 255 Cal.App.2d 765, 769, 63 Cal.Rptr. 543; *County of Santa Barbara* v. *Purcell, Inc., supra,* 251 Cal.App.2d 169, 173, 59 Cal.Rptr. 345; *Burk* v. *Municipal Court* (1964) 229 Cal.App.2d 696, 701-702, 40 Cal.Rptr. 425; *Metromedia, Inc.* v. *City of Pasadena* (1963) 216 Cal.App.2d 270, 273, 30 Cal.Rptr. 731; *National Advertising Co.* v. *County of Monterey, supra,* 211 Cal.App.2d 375, 378-379, 27 Cal.Rptr. 136; see also *City of Escondido* v. *Desert Outdoor Advertising, Inc. supra,* 8 Cal.3d 785, 790, 106 Cal.Rptr. 172, 505 P.2d 1012.

cipal Court, supra, 229 Cal.App.2d 696, 702, 40 Cal.Rptr. 425.)

The holding of *Varney & Green* v. *Williams* also conflicts with present concepts of the police power. Most jurisdictions now concur with the broad declaration of Justice Douglas in *Berman* v. *Parker* (1954) 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27: "The concept of the public welfare is broad and inconclusive. [Citation.] The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." (*Id.,* at p. 33, 75 S.Ct. at pp. 102-103.) Although Justice Douglas tendered this description in a case upholding the exercise of the power of eminent domain for community redevelopment, it has since been recognized as a correct description of the authority of a state or city to enact legislation under the police power. (*Village of Belle Terre* v. *Boraas* (1974) 416 U.S. 1, 5-6, 94 S.Ct. 1536, 1539, 39 L.Ed.2d 797; *City of Phoenix* v. *Fehlner* (1961) 90 Ariz. 13, 17, 363 P.2d 607; *People* v. *Stover* (1963) 12 N.Y.2d 462, 467-468, 240 N.Y.S.2d 734, 737-38, 191 N.E.2d 272, 274-75; *Oregon City* v. *Hartke* (1965) 240 Or. 35, 48, 400 P.2d 255; *Markham Advertising Co.* v. *State, supra,* 73 Wash.2d 405, 424, 439 P.2d 248.) As the Hawaii Supreme Court succinctly stated: "We accept beauty as a proper community objective, attainable through use of the police power." (*State* v. *Diamond Motors, Inc.* (1967) 50 Haw. 33, 36, 429 P.2d 825, 827.)[10]

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[10] Among other decisions holding that a state or city pursuant to the police power may ban billboards on the basis of aesthetic considerations alone are: *Meritt* v. *Peters* (Fla. 1953) 65 So.2d 861; *John Donnelly & Sons* v. *Mallar* (D.Me.1978) 453 F.Supp.

Present day city planning would be virtually impossible under a doctrine which denied a city authority to legislate for aesthetic purposes under the police power. Virtually every city in this state has enacted zoning ordinances for the purpose of improving the appearance of the urban environment and the quality of metropolitan life. Many municipalities engage in projects of one type or another designed to beautify their communities. Indeed, *Varney & Green* v. *Williams* itself asserted "That the promotion of aesthetic or artistic considerations is a proper object of governmental care will properly not be disputed." (155 Cal. 318, 320, 100 P. 867, 868.) But as the New York Court of Appeals pointed out, "Once it be conceded that aesthetics is a valid subject

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1272; *Donnelly Advertising Corp.* v. *City of Baltimore* (1977) 279 Md. 660, 370 A.2d 1127, 1133; *E. B. Elliott Adv. Co.* v. *Metropolitan Dade County, supra,* 425 F.2d 1141, 1151; *Stuckey's Stores, Inc.* v. *O'Cheskey* (1979) 93 N.M. 312, 600 P.2d 258, 264; *Matter of Cromwell* v. *Ferrier* (1967) 19 N.Y.2d 263, 279 N.Y.S.2d 22, 225 N.E.2d 749; *Opinion of the Justices, supra,* 103 N.H. 268, 169 A.2d 762; *Markham Advertising Co.* v. *State, supra,* 73 Wash.2d 405, 424, 439 P.2d 248; *John Donnelly & Sons* v. *Outdoor Advertising Bd.* (1970) 369 Mass. 206, 339 N.E.2d 709.

Indeed, the four cases cited in *Varney & Green* v. *Williams* to support the proposition that aesthetic considerations will not uphold a prohibition on billboards are no longer law in their respective jurisdictions. *City of Passaic* v. *Patterson Bill Posting Co., supra,* 72 N.J.L. 285, 62 A. 267, was repudiated by the New Jersey Constitution in 1947. *Commonwealth* v. *Boston* (1905) 188 Mass. 348, 74 N.E. 601, was overruled in *General Outdoor Advertising Co.* v. *Dept. of Public Works* (1935) 289 Mass. 149, 159-161, 193 N.E. 799; *Bryan* v. *City of Chester* (1905) 212 Pa. 259, 61 A. 894, was distinguished as antedating enactment of zoning enabling legislation by the court in *Silver* v. *Zoning Board* (1955) 381 Pa. 41, 112 A.2d 84. *People* v. *Green* (1903) 85 App.Div. 400, 83 N.Y.S. 460 was rejected in *People* v. *Stover, supra,* 12 N.Y.2d 462, 466-467, 240 N.Y.S.2d 734, 736-737, 191 N.E.2d 272, 274-275, and *Matter of Cromwell* v. *Ferrier, supra,* 19 N.Y.2d 263, 270, 279 N.Y.S.2d 22, 27, 225 N.E.2d 749, 753.

of legislative concern the conclusion seems inescapable that reasonable legislation designed to promote that end is a valid and permissible exercise of the police power. . . . [W]hether such a statute or ordinance should be voided should depend upon whether the restriction was 'an arbitrary and irrational method of achieving an attractive . . . community—and *not* upon whether the objectives were primarily aesthetic.'" (*People* v. *Stover, supra,* 12 N.Y.2d 462, 240 N.Y.S.2d 734, 191 N.E.2d 272.)

In a subsequent decision, the New York Court of Appeals confirmed that aesthetic considerations may justify the exercise of the police power to ban all off-site billboards in a community. (*Suffolk Outdoor Adv. Co., Inc.* v. *Hulse* (1977) 43 N.Y.2d 483, 402 N.Y.S.2d 368, 373, N.E.2d 263, app. dism., 439 U.S. 808, 99 S.Ct. 66, 58 L.Ed.2d 101.) "It cannot be seriously argued," the New York court said, "that a prohibition of this nature is not reasonably related to improving the aesthetics of the community." (*Id.*, at p. 490, 402 N.Y.S. 2d at p. 371, 373 N.E.2d at p. 266.)[11] The fact that the ordinance bans billboards in commercial and industrial areas, and that it permits on-site signs, does not demonstrate that the ordinance as a whole lacks a reasonable relationship to improving community appearance. (*E. B. Elliott Adv. Co.* v. *Metropolitan Dade County, supra,* 425 F.2d 1141, 1152.) "[T]he notion that an extensively com-

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[11] Numerous cases have commented on the unaesthetic impact of highway billboards. (See, e.g., *State* v. *Diamond Motors, supra,* 50 Haw. 33, 36, 429 P.2d 825; *United Advertising Corp.* v. *Metuchen, supra,* 42 N.J. 1, 6, 198 A.2d 447; *Markham Advertising Co.* v. *State, supra,* 73 Wash.2d 405, 417, 439 P.2d 248.) Public opinion surveys sponsored by the Federal Highway Beautification Commission indicate that the general public agrees that billboards are unsightly. (See Dowds, *Private Signs and Public Interests, op. cit. supra,* p. 233.)

mercial or industrial area will be made more attractive by the absence of billboards is open to debate. Since the issue is debatable, however, the modern judicial presumption in favor of legislation [requires the court] to uphold the ordinance as a rational means of enforcing the legislative purpose of preserving aesthetics." (Lucking, *The Regulation of Outdoor Advertising: Past, Present and Future* (1977) 6 Environmental Aff. 179, 188.)

If the San Diego ordinance reasonably relates to the public safety and welfare, it should logically follow that the ordinance represents a valid exercise of the police power. Plaintiffs contend, however, that the police power is subject to an additional limiting doctrine: That regardless of the reasonableness of the act in relation to the public health, safety, morals and welfare the police power can never be employed to prohibit completely a business not found to be a public nuisance.

This argument also rests on our decision in *Varney & Green* v. *Williams, supra,* 155 Cal. 318, 100 P. 867. There the court, as an alternative ground for its decision, held the East San Jose ordinance unconstitutional on the grounds that it did "not attempt . . . regulation, but undertakes to absolutely forbid the erection or maintenance of any billboard for advertising purposes." (P. 321, 100 P.P. 868.) No California decision since *Varney & Green* has invalidated a billboard ordinance as prohibitory, but a few decisions of other states have struck down billboard ordinances on this ground. (See *Combined Communications Corp.* v. *Denver* (1975) 189 Colo. 462, 542 P.2d 79, 82-83; *Metromedia, Inc.* v. *City of Des Plaines* (1975) 26 Ill.App.3d 942, 326 N.E.2d 59, 61-62; *Stoner McCray System* v. *City of Des Moines* (1956) 247 Iowa 1313, 1319-1320, 78 N.W.2d 843;

Norate Corp., Inc. v. *Zoning Board of Adjustment* (1955) 417 Pa. 397, 407, 207 A.2d 890.)

For the reasons we shall offer, however, we believe that this doctrine, too, conflicts with reality and with current views of the police power. The distinction between prohibition and regulation in this case is one of words and not substance. "[E]very regulation necessarily speaks as a prohibition." (*Goldblatt* v. *Hempstead* (1962) 369 U.S. 590, 592, 82 S.Ct. 987, 989, 8 L.Ed.2d 130.) In the present case, for example, plaintiffs describe the ordinance as a *prohibition of off-site advertising,* while the city describes it as a *regulation of advertising,* one which limits advertising to on-site signs. Surely the validity of the ordinance does not depend on the court's choice between such verbal formulas.

Rather than strive to develop a logical distinction between "regulation" and "prohibition," and to find themselves embroiled in language rather than fact, courts of other jurisdictions in recent decisions have held that a community can entirely prohibit off-site advertising. (*John Donnelly & Sons* v. *Mallar, supra,* 453 F.Supp. 1272; *Murphy, Inc.* v. *Westport* (1944) 131 Conn. 292, 40 A.2d 177; *John Donnelly & Sons, Inc.* v. *Outdoor Advertising Bd., supra,* 369 Mass. 206, 339 N.E.2d 709; *Suffolk Outdoor Adv. Co., Inc.* v. *Hulse, supra,* 43 N.Y.2d 483, 402 N.Y.S.2d 368, 373 N.E.2d 263; *Matter of Cromwell* v. *Ferrier, supra,* 19 N.Y.2d 263, 279 N.Y.S.2d 22, 225 N.E.2d 749.) These decisions fall within the general principle that a community may exclude any or all commercial uses if such exclusion reasonably relates to the public health, safety, morals or general welfare. (*Town of Los Altos Hills* v. *Adobe Creek Properties, Inc.* (1973) 32 Cal.App.3d 488, 502-504, 108 Cal.Rptr. 271, and cases there cited; see *Associated Home Builders, etc., Inc.* v. *City*

of Livermore, supra, 18 Cal.3d 582, 606, fn. 23, 135 Cal.Rptr. 41, 557 P.2d 473.) As the Oregon Supreme Court explained in *Oregon City* v. *Hartke, supra,* 240 Or. 35, 400 P.2d 255, "[I]t is within the police power of the city wholly to exclude a particular use if there is a rational basis for the exclusion. . . . It is not irrational for those who must live in a community from day to day to plan their physical surroundings in such a way that unsightliness is minimized. The prevention of unsightliness by wholly precluding a particular use within the city may inhibit the economic growth of the city or frustrate the desire of someone who wishes to make the proscribed use, but the inhabitants of the city have the right to forego the economic gain and the person whose business plans are frustrated is not entitled to have his interest weighed more heavily than the predominant interest of others in the community." (Ps. 49-50, 400 P.2d p. 263.)

Plaintiffs stress that most of the cases upholding a community ban on billboards or other commercial uses have involved small, predominantly residential, towns or rural localities. Recently, however, the Massachusetts Supreme Judicial Court upheld an ordinance similar to the one at issue here involving a total prohibition of billboards in a densely populated town with a sizable business and industrial district. (*John Donnelly & Sons, Inc.* v. *Outdoor Advertising Bd., supra,* 369 Mass. 206, 339 N.E.2d 709.) The court there stated that "We believe that it is within the scope of the police power for the town to decide that its total living area should be improved so as to be more attractive to both its residents and visitors. Whether an area is urban, suburban or rural should not be determinative of whether the residents are entitled to preserve and enhance their environment. Urban residents are not immune to ugliness." (P. 720.)

Relying on the cited Massachusetts decision, the United States District Court for the District of Maine recently upheld a statewide ban on off-site commercial billboards, including urban regions within the state. Its decision observes that it "can find no rational basis for concluding . . . that residents of and visitors to urban, commercial or industrial districts are not entitled to the benefit of an aesthetically pleasing environment, while those living in or visiting suburban, residential or rural regions are." (*John Donnelly & Sons* v. *Mallar, supra,* 453 F.Supp. 1272, 1281.)

Nor do we perceive how we could rationally establish a rule that a city's police power diminishes as its population grows, and that once it reaches some unspecified size it no longer has the power to prohibit billboards. San Diego, for example, has already prohibited billboards within *97 percent of its limits*—a region which in area and population far surpasses most California cities. Plaintiffs claim that a ban covering 97 percent of the city is a "regulation," while the extension of that ban to the remaining 3 percent of the city is a "prohibition," but such sophistry is a mere play upon words.

Thus the validity of Ordinance No. 10795 under the police power does not turn on its regulatory or prohibitory character, nor upon the size of the city which enacted it, but solely on whether it reasonably relates to the public safety and welfare. As we have explained, the ordinance recites that it was enacted to eliminate traffic hazards, improve the appearance of the community, and thereby protect property values. The asserted goals are proper objectives under the police power, and plaintiffs have failed to prove that the ordinance lacks a reasonable relationship to the achievement of those goals. We conclude that the summary judg-

ment cannot be sustained on the ground that the ordinance exceeds the city's authority under the police power.[12]

3. *The summary judgment cannot be sustained on the ground that the San Diego ordinance on its face abridges freedom of speech.*

Although the trial court held that the San Diego ordinance unconstitutionally invaded the First Amendment rights of billboard advertisers, controlling precedent invalidates that conclusion. On almost every occasion in which a law which prohibited off-site commercial billboards has been challenged as an abridgment of freedom of speech, the courts have rejected that challenge and sustained the law. (See *Howard* v. *State Dept. of Hwys. of Colorado* (10th Cir. 1973) 478 F.2d 581; *John Donnelly & Sons* v. *Mallar, supra,* 453 F.Supp. 1272; *John Donnelly & Sons, Inc.* v. *Outdoor Advertising Bd., supra,* 369 Mass. 206, 339 N.E.2d 709; *Donnelly Advertising Corp.* v. *City of Baltimore, supra,* 279 Md. 660, 370 A.2d 1127, 1132; *Newman Signs, Inc.* v. *Hjelle, supra,* 268 N.W.2d 741, 760-762; *United Advertising Corp.* v. *Borough of Raritan* (1952) 11 N.J. 144, 93 A.2d 362; *Stuckey's Stores, Inc.* v. *O'Cheskey, supra,* 93 N.M. 312, 600 P.2d 258; *Suffolk Outdoor Advertising Co., Inc.* v. *Hulse, supra,* 43 N.Y.2d 483, 402 N.Y.S.2d 368, 373

[12] *Varney & Green* v. *Williams, supra,* 155 Cal. 318, 100 P. 867, is hereby overruled. Language in the following cases contrary to the views expressed herein is disapproved; *City of Escondido* v. *Desert Outdoor Advertising, Inc., supra,* 8 Cal.3d 785, 106 Cal. Rptr. 172, 505 P.2d 1012; *Desert Outdoor Advertising, Inc.* v. *County of San Bernardino, supra,* 255 Cal.App.2d 765, 63 Cal.Rptr. 543; *County of Santa Barbara* v. *Purcell, Inc., supra,* 251 Cal.App. 2d 169, 59 Cal.Rptr. 345; *National Advertising Co.* v. *County of Monterey, supra,* 211 Cal.App.2d 375, 27 Cal.Rptr. 136; *City of Santa Barbara* v. *Modern Neon Sign Co., supra,* 189 Cal.App.2d 188, 11 Cal.Rptr. 57.

N.E.2d 263; *Lubbock Poster Co.* v. *City of Lubbock* (Tex. Civ.App. 1978) 569 S.W.2d 935, 945; *Ackerley Communications, Inc.* v. *City of Seattle* (1979) 92 Wash.2d 905, 602 P.2d 1177; *State* v. *Lotze, supra,* 92 Wash.2d 52, 593 P.2d 811, 813-815; *Markham Advertising Co.* v. *State, supra,* 73 Wash.2d 405, 439 P.2d 248.)[13]

Plaintiffs note that some of the decisions in point relied heavily on *Valentine* v. *Chrestensen* (1942) 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262 in which the Supreme Court declared that "the Constitution imposes no . . . restraint on government as respects purely commercial advertising." (*Id.,* at p. 54, 62 S.Ct. at p. 921.) Within the last five years, a series of that court's decisions have repudiated *Valentine* v. *Chrestensen* and held that commercial speech may command First Amendment protection. (*Bigelow* v. *Virginia* (1975) 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600; *Virginia Pharmacy Board* v. *Virginia Consumer Council* (1976) 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346; *Linmark Associates* v. *Township of Willingboro* (1977) 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155; *Bates* v. *State Bar*

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[13] The only exception is an unreported decision of a Colorado district court in *Combined Communications Corporation* v. *City and County of Denver,* cited in the trial court's memorandum opinion. The Colorado Supreme Court subsequently affirmed the decision without discussion of the First Amendment issue. (*Combined Communications Corp.* v. *Denver* (1975) 189 Colo. 462, 542 P.2d 79.)

The Oklahoma Supreme Court in *State ex rel. Dept. of Transp.* v. *Pile* (1979) 603 P.2d 337 held a state law prohibiting the erection of billboards within 660 feet of federal highways in rural areas violated an Oklahoma constitutional free speech provision as applied to prohibit a noncommercial billboard. The opinion is cast in broad terms which imply that the federal Highway Beautification Act and all state laws enacted to conform to that act abridge freedom of speech. The specific holding of the court, however, is limited to a question of Oklahoma constitutional law, and is distinguishable on several counts from the present case.

of Arizona (1977) 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810.) Plaintiffs contend that as a result of these decisions, a law prohibiting commercial billboards can no longer be sustained.

When first presented to us, plaintiffs' First Amendment contention presented an arguable issue. While this case was pending before us, however, the New York Court of Appeals, in *Suffolk Outdoor Advertising Co.* v. *Hulse, supra,* 43 N.Y.2d 483, 402 N.Y.S.2d 368, 373 N.E.2d 263, upheld a community-wide ban on off-site billboards. The advertising company appealed to the United States Supreme Court, which dismissed the appeal for want of a substantial federal question. (439 U.S. 808, 99 S.Ct. 66, 58 L.Ed.2d 101.) Subsequently the court also dismissed appeals in two cases which sustained state laws banning off-site billboards outside of commercial or industrial areas. (*Newman Signs, Inc.* v. *Hjelle, supra,* 268 N.W.2d 741; *State* v. *Lotze, supra,* 92 Wash.2d 52, 593 P.2d 811.)

Each of the cited cases in which the Supreme Court dismissed appeals expressly rejected the contention that a prohibition on off-site billboards conflicts with the reasoning of the commercial speech cases. Since the Supreme Court regards the dismissal of an appeal as a decision on the merits (*Hicks* v. *Miranda* (1975) 422 U.S. 332, 343-345, 95 S.Ct. 2281, 2288-90, 45 L.Ed.2d 223), we conclude that the high court has resolved that a prohibition of off-site billboards does not violate the First Amendment.

An issue remains as to whether the San Diego ordinance violates the free speech clause of the California Constitution. (Art. I, § 2.) We therefore set forth our reasons for concluding that the San Diego ordinance is a permissible regulation of the time, place, and manner of speech, and

thus does not abridge freedom of speech under the California Constitution.

Eight decisions of other jurisdictions, filed after the United States Supreme Court first ruled that commercial speech is protected under the First Amendment, have each held that laws prohibiting commercial off-site billboards do not impair freedom of speech. (See cases cited pp. 519, 520 of 164 Cal.Rptr., ante.) The opinion of Judge Gignoux in *John Donnelly & Sons* v. *Mallar, supra,* presents a comprehensive exposition of the validity of such laws as regulations of the time, place, or manner of speech. That opinion points out that an ordinance which regulates commercial speech will pass constitutional inspection as a lawful regulation of the time, place, and manner of speech if it satisfies three criteria: "the restriction on speech must be 'justified without reference to the content of the regulated speech,' (2) the restriction must 'serve a significant governmental interest,' and (3) in so doing, the restriction must 'leave open ample alternative channels for communication of the information.'" (*John Donnelly & Sons* v. *Mallar, supra,* 453 F.Supp. 1272, 1277, citing *Linmark Associates* v. *Township of Willingboro, supra,* 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155 and *Virginia Pharmacy Board* v. *Virginia Consumer Council, supra,* 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346.) The San Diego ordinance complies with these requirements.

First, the instant ordinance does not seek to suppress the content of the advertiser's message. Each of the high court decisions on which plaintiffs rely struck down laws aimed at the suppression of a particular message based on the content of that message. *Bigelow* invalidated a law prohibiting advertising which explained how to obtain an abortion; *Virginia Pharmacy Board* invalidated a law

banning advertisement of drug prices; *Linmark* invalidated an ordinance banning residential "for sale" and "sold" signs; *Bates* invalidated a state bar rule against attorney advertising. Ordinance No. 10795, by way of contrast, was not enacted to prevent an advertiser from communicating his message to the public, but only to bar him from using a particularly unsightly and intrusive mode of communication.

Second, as we have already explained, the ordinance serves significant governmental interests—promoting traffic safety and improving the appearance of the community —unrelated to the suppression of free expression. (Cf. *United States* v. *O'Brien* (1968) 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672.)

Finally, the ordinance leaves open adequate alternative means of communication. In upholding a Maine statute which imposed a statewide ban on off-site commercial billboards, the federal district court observed that the act "leaves open ample alternative channels for communication of the information now carried by off-premises outdoor advertising. . . . Many, if not all, of the commercial messages displayed on off-premises signs can be conveyed to the traveling public through on-premises advertising, official business directional signs, and tourist information centers and publications, all of which are sanctioned by the Act. . . . Other forms of print media, which, like outdoor advertising, enjoy the advantage of being relatively low in cost, such as pamphleting and leafleting, lie beyond the scope of the Act altogether. . . ." (*John Donnelly & Sons* v. *Mallar, supra,* 453 F.Supp. 1272, 1279-1280.)

The New York Court of Appeals, sustaining a community ordinance which prohibited all off-site billboards, reached the same conclusion: "Although prohibiting non-

accessory billboards, the ordinance permits the maintenance of accessory or on-premises billboards, thus providing an operative means of advertising." (*Suffolk Outdoor Advertising Co.* v. *Hulse, supra,* 43 N.Y.2d 483, 490, 402 N.Y.S.2d 368, 371, 373 N.E.2d 263, 266.) "Since the challenged ordinance . . . regulates only the place and manner in which billboards may be maintained, we conclude that [it] does not infringe the right to free speech guaranteed by the First Amendment." (*Id.,* at p. 489, 402 N.Y.S.2d at p. 370, 373 N.E.2d at p. 265.)

The foregoing decisions properly hold that a community ordinance prohibiting off-site commercial billboards leaves open adequate alternative means of communication. Advertisers of consumer products and services can communicate through newspapers, magazines, radio, and television. Local business can in addition employ on-site billboards. The relatively few non-commercial advertisers who would be restricted by the San Diego ordinance also possess a great variety of alternative means of communication, including some methods, such as leafleting, which are not more expensive than billboards.[14] The San Diego ordinance is not unique; over 100 cities and towns in California and the entire States of Hawaii, Maine, and Ver-

[14] Plaintiffs call attention to stipulation No. 28, which states in part that "Many businesses, politicians, and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive." The possibility that the ordinance may impede an occasional advertiser from communicating his message to the public, however, is not sufficient to invalidate the ordinance *on its face.* In the present litigation, which pits only the owners of the billboards against the city, individual advertisers are not parties; such an advertiser retains the ability to assert that, owing to the absence of reasonable alternative means of communication, the ordinance cannot constitutionally *be applied* to prevent him from using a billboard to proclaim his message.

mont have banned off-site billboards; advertisers in such areas make use of other means of communicating with the public.

In arguing that the San Diego ordinance cannot be sustained as a regulation of time, place, and manner, plaintiffs cite to cases involving leaflets, soundtrucks, newspapers, maps, and other forms of communication which courts have held can be subjected only to narrowly drawn regulations serving a compelling governmental interest.[15] We do not find those cases controlling here. Unlike leaflets, newspapers, and the like, a billboard is a large, immobile, and permanent structure which like other structures is subject to zoning regulation. The city's right to regulate the commercial use of property, and to ban uses which imperil traffic safety or denigrate the appearance of the community justifies restrictions which go beyond those imposed upon more transitory or less obtrusive media.

We find support for our conclusion that the city's interest in regulating the commercial use of property justifies the instant ordinance in the decision of the United States Supreme Court in *Young* v. *American Mini Theatres* (1976) 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310. Upholding a zoning ordinance which prohibited adult theaters within 500 feet of residential areas or 1,000 feet of other adult establishments, the court held that the city's interest in regulating commercial use of real property outweighed the incidental effect of the ordinance upon First

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[15] See *Schneider* v. *State* (1939) 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (leaflets); *Welton* v. *City of Los Angeles* (1976) 18 Cal.3d 497, 134 Cal.Rptr. 668, 556 P.2d 1119 (roadside sale of maps); *Wollam* v. *City of Palm Springs* (1963) 59 Cal.2d 276, 29 Cal.Rptr. 1, 379 P.2d 481 (soundtrucks); *Kash Enterprises, Inc.* v. *City of Los Angeles* (1977) 19 Cal.3d 294, 138 Cal.Rptr. 53, 562 P.2d 1302 (newsracks).

Amendment values. (See 427 U.S. at p. 63, 96 S.Ct. at p. 2448; *id.*, at p. 76, 84, 96 S.Ct. at pp. 2455, 2459 (Powell, J, conc.).) Rejecting the contention that the challenged ordinance abridged freedom of speech, *Young* reiterated the principle that commercial speech acquires only a lesser degree of constitutional protection.[16] Significantly the court, to illustrate that principle, cited several examples of valid regulation of commercial speech, among which was the proposition that "A state statute may permit highway billboards to advertise businesses located in the neighborhood but not elsewhere." (427 U.S. at p. 68, 96 S.Ct. at p. 2451, citing the court's dismissal of the appeal in *Markham Advertising Co.* v. *State, supra,* 73 Wash.2d 405, 439 P.2d 248, app. dismissed, 393 U.S. 316, 89 S.Ct. 553, 21 L.Ed.2d 512.)[17]

The New York Court of Appeals also supports our distinction between billboards and other media. In 1976 that court held unconstitutional an ordinance which prohibited all commercial handbills. (*People* v. *Remeny* (1976) 40 N.Y.2d 527, 387 N.Y.S.2d 415, 355 N.E.2d 375.) One year

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[16] In *Ohralik* v. *Ohio State Bar Assn.* (1978) 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444, the Supreme Court summarized the limited constitutional protection given commercial speech: "We have not discarded the 'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. . . . [W]e instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of non-commercial expression." (436 U.S. at pp. 455-456, 98 S.Ct. at p. 1918.)

[17] The Maryland Court of Appeals, sustaining a ban on billboards in the Oldtown urban renewal district of Baltimore, relied squarely on the Supreme Court decision in *Young* v. *American Mini Theatres.* (*Donnelly Advertising Corp.* v. *City of Baltimore, supra,* 279 Md. 660, 370 A.2d 1127, 1132.)

later, however, the court upheld an ordinance which prohibited all off-site billboards as a permissible regulation of the time, place, and manner of speech. (*Suffolk Outdoor Advertising Co., Inc.* v. *Hulse, supra,* 43 N.Y.2d 483, 402 N.Y.S.2d 368, 373 N.E.2d 263.)

In summary, San Diego asserts a strong interest in removing commercial off-site billboards to enhance the appearance of the community and to improve traffic safety. To further those ends, the city enacted a zoning ordinance which does not seek to suppress the content of the advertising messages, but only to prohibit one means by which such messages are placed before the public. A multitude of published decisions support the proposition that such an ordinance does not abridge freedom of speech. Finding that the recent commercial speech cases of the United States Supreme Court do not undermine those decisions, and that billboards, as permanent intrusive uses of land, may reasonably be distinguished from other media, we conclude that the San Diego ordinance does not on its face abridge freedom of speech under either the United States or California Constitutions.

4. *The San Diego ordinance is preempted by the Outdoor Advertising Act to the extent that the ordinance requires removal without compensation of billboards within 660 feet of federal interstate and primary highways.*

Plaintiffs contend that the summary judgment below should be sustained on the ground that Ordinance No. 10795 is preempted by provisions of the Outdoor Advertising Act (Bus. & Prof.Code, § 5200 et seq.). Plaintiffs rely on two provisions: Section 5226, which states generally the legislative policy and findings underlying the Outdoor

Advertising Act, and section 5412, which requires payment of compensation for removal of billboards when such compensation is necessary to protect the state's share of federal highway funds.

Section 5226 reads as follows: "The regulation of advertising displays adjacent to any interstate highway or primary highway . . . is hereby declared to be necessary to promote the public safety, health, welfare, convenience and enjoyment of public travel, to protect the public investment in such highways, to preserve the scenic beauty of lands bordering on such highways, and to insure that information in the specific interest of the traveling public is presented safely and effectively, recognizing that a reasonable freedom to advertise is necessary to attain such objectives. The Legislature finds:

"(a) Outdoor advertising is a legitimate commercial use of property adjacent to roads and highways.

"(b) Outdoor advertising is an integral part of the business and marketing function, and an established segment of the national economy, and should be allowed to exist in business areas, subject to reasonable controls in the public interest."

The significance of section 5226 is not clear. The section states broad policy objectives but neither expressly authorizes billboards in business areas nor explicitly limits the authority of municipalities to prohibit billboards in such areas. Although the findings of section 5226 could be read literally to authorize maintenance of billboards in commercial areas despite any contrary local prohibition[18] such an interpretation apparently conflicts with sec-

[18] If section 5226 were construed to authorize billboards in commercial areas of cities, including locations not adjacent to state or

tion 5229, which provides that "The provisions of this chapter shall not be construed to permit a person to place or maintain in existence . . . any outdoor advertising prohibited by . . . any ordinance of any city . . . ." Section 5230 further confirms the authority of a city under the police power; it states that "The governing body of any city, county, or city and county may enact ordinances, including, but not limited to, land use or zoning ordinances, imposing restrictions on advertising displays adjacent to any street, road, or highway equal to or greater than those imposed by this chapter." [19]

Viewed in context, section 5226 appears to be a statement of policy, adopted to explain why the Legislature enacted a statute providing for the eventual elimination of outdoor advertising displays adjacent to state and interstate highways in noncommercial areas, but not for the prohibition of such displays within business areas. The section does not constitute a substantive limitation on the police power of the municipality, and thus should not be construed to preempt municipal authority.

Section 5412, the other provision on which plaintiffs rest their preemption argument, does serve to preempt the San Diego ordinance to a limited extent. Section 5412 provides that: "If federal law requires the states to pay just com-

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interstate highways, it might be invalid as a regulation of a municipal affair. (See *Bishop* v. *City of San Jose* (1969) 1 Cal.3d 56, 63, 81 Cal.Rptr. 465, 460 P.2d 137.)

[19] Further lack of clarity arises from the language of section 5227, which states that "It is the intention of the Legislature to occupy the whole field of regulation by the provisions of this chapter except that nothing in this chapter prohibits . . . the passage by any county of reasonable land use or zoning regulations affecting the placing of advertising displays. . . ." If this language is intended to grant only counties, and not cities, authority to regulate advertising by zoning, it is inconsistent with section 5230.

pensation with regard to the removal of any advertising display, the owner or owners of such advertising display and the owner or owners of the land upon which such display is located, shall be paid just compensation. The sole intent of the Legislature in enacting this section is to comply with federal law, and it is otherwise not the intent of the Legislature to in any manner relinquish any of its powers relating to the removal of advertising displays under the police power." [20] As the language of the section demonstrates, it requires payment of compensation only when such payment is necessary to comply with *federal law.* (See 55 Ops.Cal.Atty.Gen. 1 (1972).) Analysis of the alleged preemptive effect of section 5412, consequently, requires a review of the provisions of the relevant federal statute, the Highway Beautification Act of 1965 (23 U.S.C. § 131), as amended in November of 1978 (see 92 Stat. 2700-2701).

Subsection (b) of the act provides for a 10 percent cut in federal-aid highway funds to any state which fails to provide effective control of outdoor advertising signs, displays, and devices which fall in either of two categories: (1) signs "within six hundred and sixty feet of the nearest edge of the right-of-way and visible from the main traveled way of the [Interstate System and the primary system of federal highways]," and (2) "those additional outdoor advertising signs, displays, and devices which are more than six hundred and sixty feet off the nearest edge of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected

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[20] The quoted language is the text of section 5412 as enacted in 1975. The language of prior section 5412 (enacted in 1970), and of prior section 5288.3a (enacted in 1967 and repealed by the enactment of § 5412) does not differ from the present section in any respect material to the instant case.

with the purpose of their message being read from such main traveled way." [21] Since all signs at issue in this litigation are located within urban areas, we are concerned only with the first category—signs within 660 feet of federal primary or interstate highways.

Under subsection (c), "effective control" of outdoor advertising signs requires that all signs within 660 feet of federal interstate and primary highways must be removed except for official and directional signs, signs advertising property for sale or lease, on-site advertising, landmark signs, and signs advertising free coffee.[22]

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[21] Subsection (b) reads in full as follows:

"(b) Federal-aid highway funds apportioned on or after January 1, 1968, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of outdoor advertising signs, displays, and devices which are within six hundred and sixty feet of the nearest edge of the right-of-way and visible from the main traveled way of the system, and Federal-aid highway funds apportioned on or after January 1, 1975, or after the expiration of the next regular session of the State legislature, whichever is later, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of those additional outdoor advertising signs, displays, and devices which are more than six hundred and sixty feet off the nearest edge of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall be reduced by amounts equal to 10 per centum of the amounts which would otherwise be apportioned to such State under section 104 of this title, until such time as such State shall provide for such effective control. Any amount which is withheld from apportionment to any State hereunder shall be reapportioned to the other States. Whenever he determines it to be in the public interest, the Secretary may suspend, for such periods as he deems necessary, the application of this subsection to a State."

[22] Subsection (c) reads as follows:

"(c) Effective control means that such signs, displays, or devices after January 1, 1968, if located within six hundred and sixty

Subsection (d), however, provides that a state may agree with the Secretary of Transportation to permit signs whose size, lighting, and spacing are consistent with customary usage in areas zoned commercial or industrial; although subsection (d) is not explicit on the point, its apparent purpose is to permit signs in commercial and industrial areas which absent agreement would be prohibited by subsection (c).[23]

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feet of the right-of-way and, on or after July 1, 1975, or after the expiration of the next regular session of the State legislature, whichever is later, if located beyond six hundred and sixty feet of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall, pursuant to this section, be limited to (1) directional and official signs and notices, which signs and notices shall include, but not be limited to, signs and notices pertaining to natural wonders, scenic and historical attractions, which are required or authorized by law, which shall conform to national standards hereby authorized to be promulgated by the Secretary hereunder, which standards shall contain provisions concerning lighting, size, number, and spacing of signs, and such other requirements as may be appropriate to implement this section, (2) signs, displays, and devices advertising the sale or lease of property upon which they are located, (3) signs, displays, and devices, including those which may be changed at reasonable intervals by electronic process or by remote control, advertising activities conducted on the property on which they are located, (4) signs lawfully in existence on October 22, 1965, determined by the State, subject to the approval of the Secretary, to be landmark signs, including signs on farm structures or natural surfaces, of historic or artistic significance the preservation of which would be consistent with the purposes of this section, and (5) signs, displays, and devices advertising the distribution of nonprofit organizations of free coffee to individuals traveling on the Interstate System or the primary system. For the purposes of this subsection, the term 'free coffee' shall include coffee for which a donation may be made, but is not required."

[23] Subsection (d) reads as follows:

"(d) In order to promote the reasonable, orderly and effective display of outdoor advertising while remaining consistent with the

Pursuant to subsection (d), the State of California entered into an agreement in 1968 with the Secretary of Transportation to permit billboards, subject to restrictions on size, spacing, and similar matters, in commercial and industrial zones of all California cities. The agreement, however, contains a caveat: "Nothing contained herein shall be construed to abrogate or prohibit the State or any subdivision of the State from exercising a greater degree of control of outdoor advertising signs, displays and devices than that required by the Act or from adopting standards which are more restrictive in controlling outdoor advertising signs, displays and devices than the provisions of this Agreement." Hence the agreement itself does not prevent San Diego from prohibiting commercial off-site billboards; in effect, the state has elected to protect such billboards under a subsection (d) agreement only when communities within the state do not prohibit those billboards under the local police power. In 1972, by enacting

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purposes of this section, signs, displays, and devices whose size, lighting and spacing, consistent with customary use is to be determined by agreement between the several States and the Secretary, may be erected and maintained within six hundred and sixty feet of the nearest edge of the right-of-way within areas adjacent to the Interstate and primary systems which are zoned industrial or commercial under authority of State law, or in unzoned commercial or industrial areas as may be determined by agreement between the several States and the Secretary. The States shall have full authority under their own zoning laws to zone areas for commercial or industrial purposes, and the actions of the States in this regard will be accepted for the purposes of this Act. Whenever a bona fide State, county, or local zoning authority has made a determination of customary use, such determination will be accepted in lieu of controls by agreement in the zoned commercial and industrial areas within the geographical jurisdiction of such authority. Nothing in this subsection shall apply to signs, displays, and devices referred to in clauses (2) and (3) of subsection (c) of this section."

the ordinance at issue in this litigation, San Diego exercised its power under this caveat and prohibited off-site commercial billboards in areas of the city zoned for commerce or industry.

Finally, we come to subsection (g), the language of which is crucial to the determination of this appeal. That subsection, as amended in 1978, provides that "Just compensation shall be paid upon the removal of any outdoor advertising sign, display, or device lawfully erected under State law and not permitted under subsection (c) of this section, whether or not removed pursuant to or because of this section." [24]

Some of the billboards banned by the San Diego ordinance stand within 660 feet of federal interstate or primary highways. Since these are ordinary advertising billboards, not official signs, landmark signs, or other signs exempt from removal under the act, subsection (c) of the act required their removal. The 1968 agreement between the state and the Secretary of Transportation, however, permitted those billboards to remain standing unless a subdivision of the state adopted more restrictive standards. As we have stated, in 1972, San Diego enacted more restrictive standards by prohibiting off-site commercial billboards, thereby depriving those billboards of the protection of the 1968 agreement. The question therefore arises

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[24] The balance of subsection (g) specifies that "The Federal Share of such compensation shall be 75 per centum. Such compensation shall be paid for the following:

"(A) The taking from the owner of such sign, display, or device of all right, title, leasehold, and interest in such sign, display, or device; and

"(B) The taking from the owner of the real property on which the sign, display, or device is located, of the right to erect and maintain such signs, displays, and devices thereon."

whether just compensation must be paid upon the removal of billboards previously saved from removal by an agreement between the state and the Secretary of Transportation, but which no longer fall within the protective scope of that agreement.

In our opinion compensation is required. Subsection (g) of the Highway Beautification Act, as amended in 1978, requires compensation upon removal of any billboard "not permitted under subsection (c)." The only billboards permitted under subsection (c) are official signs, on-site advertising, and like exempt signs; the billboards in question do not fall within any of the exemptions and are therefore billboards "not permitted under subsection (c)." Under the literal language of the act, the fact that these billboards were previously protected by an agreement between the state and the Secretary of Transportation, an agreement authorized by subsection (d) of the act, has no bearing upon the fact that they are billboards "not permitted under subsection (c)." The literal language of the federal act therefore compels compensation.

This conclusion finds support in the legislative history of the 1978 amendment which added the phrase "not permitted under subsection (c)" to subsection (g) of the act. The Report of the House Committee on Public Works and Transportation indicated that whenever a state or local government did not exercise its option to enter into an agreement with the Secretary of Transportation to protect signs in commercial and industrial areas, then no distinction could be drawn between signs which could be protected by agreement under subsection (d) and those which could not; "all of the signs are nonconforming with the 'effective control' requirements of subsection (c), and the committee is of the opinion that subsection (g) requires

payment of just compensation for their removal. . . . [J]ust compensation must be paid upon the removal of any lawfully erected sign which is not permitted under subsection (c)." (Report, No. 95-1485, p. 16, U.S.Code Cong. & Admin. News 1978, pp. 6575, 6592.)

We have carefully considered the decision of the Washington Supreme Court in *Ackerley Communications, Inc.* v. *City of Seattle, supra,* 92 Wash.2d 905, 602 P.2d 1177. Denying compensation for removal of signs within commercial and industrial zones, *Ackerley* stated that "[s]ince signs within commercial and industrial zones which are not governed by an agreement between the State and the Department of Transportation are not regulated by, and are wholly outside the scope of, the federal statute, the only reasonable interpretation of the statutory language is that it does not require compensation for such signs." (602 P.2d at p. 1184.) We must respectfully disagree with the analysis of *Ackerley.* In our opinion, the federal statute does regulate signs within commercial and industrial zones which are not governed by a federal-state agreement —specifically, the act prohibits such signs unless they fall within the five exempt categories of subsection (c). Consequently, it requires compensation when those signs are removed.[25]

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[25] The City of San Diego, seconded by the City of Alameda as amicus, advance an argument similar to the *Ackerley* opinion. They contend that subsection (d) of the act and agreements between the state and the Secretary of Transportation pursuant to that subsection impliedly amend and limit the scope of subsection (c). The phrase "not permitted under subsection (c)," they contend, refers only to signs which are both barred by the express language of subsection (c)—that is, signs which are neither official signs, landmarks, or the like—*and* which could not have been protected from removal by a subsection (c) agreement. In other words, they maintain that compensation is required only when the act *as a*

The city argues that under the wording of subsection (g) prior to the 1978 amendments, compensation was not required for removal of any sign which constituted a nonconforming use under local zoning[26] (see *Lubbock Poster Co.* v. *City of Lubbock, supra,* 569 S.W.2d 935, 945), and urges that we should not give the 1978 amendments retrospective effect. The Federal Highway Administration, however, takes the position that the 1978 amendments apply to require compensation for "signs still in existence on November 6, 1978, and those additional signs which were removed prior to November 6, 1978, but were the subject of litigation pending on that date." (Memo. Fed. Highway Administrator, Mar. 6, 1979.) Since the Federal Highway Administration is the agency charged with the enforcement of the Highway Beautification Act, its interpretation of the act merits great weight. (See, e. g., *Northern Ind. Pub. Serv. Co.* v. *Walton League* (1975) 423 U.S. 12, 15, 96 S.Ct. 172, 173, 46 L.Ed.2d 156; *Los Angeles* v. *Public*

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whole compels the removal of a sign, and since the act permits signs in commercial and industrial areas which conform to a subdivision (c) agreement, compensation is not required when a local ordinance requires the removal of such signs.

We appreciate the policy arguments in favor of limiting the requirement of compensation to cases in which the act as a whole compels removal of the billboard. The cities' proffered construction of the amended act, however, cannot be reconciled with the language of the amended act and the legislative history of the amendments.

[26] Before 1978 subsection (g) required compensation upon removal of signs "lawfully in existence on the date of enactment of this subsection . . . [or] lawfully erected on or after January 1, 1968." The chief counsel of the Federal Highway Administration interpreted that ambiguous language to signify that when a sign became a nonconforming use it ceased to be lawfully erected, and thus no compensation was required for its removal. Following the 1978 amendment the Federal Highway Administration withdrew that opinion.

Utilities Com. (1975) 15 Cal.3d 680, 696, 125 Cal.Rptr. 779, 542 P.2d 1371.) Mindful of that interpretation, and of the risk that this state might lose substantial funds if we were to adopt a construction contrary to that of the federal administration, we conclude that the amended act applies to billboards in existence or removed subject to litigation as of November 6, the effective date of the amendments.

We believe that the Highway Beautification Act as amended requires the payment of compensation for removal of all billboards existing or subject to litigation on November 6, 1978, located within 660 feet of federal interstate or primary highways within San Diego and visible from the main traveled way of such highways. We reach that conclusion reluctantly, since its effect in this case and in future cases will probably frustrate the original intent of the Highway Beautification Act: to accelerate the removal of billboards and thereby "promote the safety and recreational value of public travel, and to preserve natural beauty." (23 U.S.C. § 131(a).)[27]

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[27] In opposing the 1978 amendment to the Highway Beautification Act, the chief counsel for the Federal Highway Administration stated that: "The proposed amendment will have the effect of severely limiting local prerogatives to control outdoor advertising by turning the Highway Beautification Act into a statute which protects signs from local land use decisions and ensuring compensation, irrespective of the reason for removal. This would represent an unprecedented limitation on local zoning authorities. Traditionally, localities have controlled outdoor advertising, along with other types of nonconforming land uses, under the police power, which would allow removal by amortization."

Subsequent to enactment of the amendments, the administration declined to budget funds for the highway beautification program. It explained to Congress that "in light of recently enacted legislation that drastically reduces the scope of the highway beautification program, the budget does not request any funds for this purpose pending completion of a comprehensive Department of

The 1978 amendments have, in effect, inverted the purpose of the act, making the secondary goal of ensuring compensation dominant over the primary goal of encouraging billboard removal. (See Steif, *The Billboards are Back,* The Progressive, p. 44 (June 1979).) Nevertheless, the language and administrative construction of the amended act clearly compel compensation, and local removal of billboards without compensation, even though undertaken to promote public safety and preserve natural beauty, would imperil the state's receipt of federal highway funds.

As we noted earlier, section 5412 of California's Outdoor Advertising Act sought to preempt local police power authority and to require payment of compensation when such preemption was necessary to protect California's receipt of federal highway funds. The City of San Diego contends that the regulation and removal of billboards is a municipal affair and that the Legislature thus may not constitutionally enact legislation which preempts local regulatory power. (See generally *Bishop* v. *City of San Jose, supra,* 1 Cal.3d 56, 62-63, 81 Cal.Rptr. 465, 460 P.2d 137.) We note, however, that receipt of federal highway funds is a matter of statewide concern; consequently local regulation and removal of billboards, to the extent that it endangers such receipt, becomes also a matter of statewide concern. The courts have recognized that municipal action which affects persons outside of the municipality becomes to that extent a matter which the sate is empowered to prohibit or regulate (*CEEED* v. *California Coastal Zone Conservation Com.* (1974) 43 Cal.App.3d 306, 321, 118

Transportation review of the program to determine if it can be successfully continued." (Budget U.S. Gov., Fiscal Year 1980, p. 184.)

Cal.Rptr.. 315 and cases there cited); the action of San Diego in that it affects the receipt of federal funds by the state or other California communities falls within that principle.

Accordingly we conclude that San Diego Ordinance No. 10795, to the extent that it permits the removal without compensation of billboards for which compensation is required under title 23, section 131 of the United States Code, is preempted by the California Outdoor Advertising Act, and hence invalid.[28] The application of Ordinance No. 10795 to billboards not protected by federal law—that is, to billboards more than 660 feet from federal interstate or primary highways, or billboards not in existence or removed subject to litigation on November 6, 1978—is not preempted by the Outdoor Advertising Act. The ordinance's proscription upon erection of future billboards is likewise unaffected by the federal requirement for just compensation and thus not preempted by state law.

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[28] The City of San Diego argues that "it is to be seriously questioned whether a Federal Act which purportedly is intended to provide 'effective control' and removal of billboards, but which in actuality, due to lack of funding to pay for removal, results in *protection* of billboards, can, without violating the Tenth Amendment of the United States Constitution, prevent use of local police powers under penalty of withholding federal monies." So long as federal funds are available, the Highway Beautification Act's program for a federal-state partnership in removing billboards visible from federal highways clearly presents no substantial issue under the Tenth Amendment. Since the record before us does not indicate that the federal government would not provide whatever funds are needed to pay its 75 percent share for the removal of billboards within 660 feet of federal highways in San Diego, we need not reach the issues that might be posed by federal regulation in the absence of funding.

5. *The San Diego ordinance does not deny plaintiffs the equal protection of the laws.*

We reject plaintiffs' contention that the city's failure to pay compensation for the removal of all of their billboards, in light of the requirement for compensation to owners of billboards within the preemptive scope of the Outdoor Advertising Act, denies the equal protection of the laws. Since the distinction involves purely economic regulation it may be sustained if the classification bears a rational relationship to a legitimate state purpose. (*People ex rel. Dept. of Transportation* v. *Desert Outdoor Advertising, Inc.* (1977) 68 Cal.App.3d 440, 450, 137 Cal.Rptr. 221.)

California decisions establish that a city seeking to eliminate nonconforming uses may pursue two constitutionally equivalent alternatives: It can eliminate the use immediately by payment of just compensation, or it can require removal of the use without compensation following a reasonable amortization period. (See *Livingston Rock etc. Co.* v. *County of L.A.* (1954) 43 Cal.2d 121, 127, 272 P.2d 4.) The choice between the alternatives largely involves budgetary considerations. The state has chosen to require compensation when the funds for such purpose are augmented by a 75 percent federal contribution. When such federal funds are not available, the state has not required compensation, and the city has accordingly chosen the more economical alternative of requiring abatement after expiration of an amortization period. We find no denial of equal protection in that decision. (See *Ackerley Communications, Inc.* v. *City of Seattle, supra,* 92 Wash.2d 905, 602 P.2d 1177, 1187.)

6. *The summary judgment cannot be sustained on the ground that the amortization period prescribed by the ordinance as applied to all or any of plaintiffs' signs is unreasonably short.*

The San Diego ordinance requires abatement of all off-site billboards following expiration of an amortization period. That period is computed in the following manner: First, the owner determines the original cost of the sign, including the cost of installation. Second, he deducts 10 percent of that cost for each year the sign has been standing prior to the effective date of the ordinance, arriving at a figure which the ordinance refers to as "the adjusted market value." The ordinance then provides an abatement schedule ranging from one year for signs with an "adjusted market value" of less than $500 to four years for signs with an "adjusted market value" in excess of $20,000.[29]

Finally, the ordinance states that notwithstanding the abatement schedule in the ordinance, any signs located within 500 feet of freeways or scenic highways must be removed within 90 days. This provision is based on the

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[29] The ordinance was enacted March 14, 1972. It provides the following abatement schedule:

"Adjusted Market Value			Abatement Date
Less than	$	500.00	April 1, 1973
$ 500.00 to		999.99	July 1, 1973
1,000.00 to		1,499.99	October 1, 1973
1,500.00 to		1,999.99	January 1, 1974
2,000.00 to		2,999.99	April 1, 1974
3,000.00 to		3,999.99	July 1, 1974
4,000.00 to		4,999.99	October 1, 1974
5,000.00 to		7,499.99	January 1, 1975
7,500.00 to		9,999.99	April 1, 1975
10,000.00 to		12,499.99	July 1, 1975
12,500.00 to		14,999.99	October 1, 1975
15,000.00 to		19,999.99	January 1, 1976
20,000.00		and over	April 1, 1976."

fact that such signs were rendered nonconforming uses by prior city zoning ordinances. Since those prior ordinances had been in force for about 3 years before the effective date of Ordinance No. 10795, the signs in question received an actual amortization period of at least 3 years and 90 days.

Thus the amortization period under the ordinance depends upon the conformity of the signs under prior ordinances, the original cost of the signs, and the time elapsed since erection of the signs. As the parties stipulated, the abatement schedule is not computed on the basis of current fair market value, useful life, or income generated by the signs. Relying on that stipulation, plaintiffs contend that the amortization period is unreasonable on its face and hence that the ordinance, to the extent that it requires removal of billboards without compensation or a reasonable amortization period, denies due process of law. The trial court in its memorandum opinion granting the motion for summary judgment found that plaintiffs had not provided sufficient proof that the abatement schedule was unreasonable as applied to their billboards.

The California cases have firmly declared that zoning legislation may validly provide for the eventual termination of nonconforming uses without compensation if it provides a reasonable amortization period commensurate with the investment involved. (*National Advertising Co.* v. *County of Monterey* (1970) 1 Cal.3d 875, 878, 83 Cal.Rptr. 577, 464 P.2d 33; *Livingston Rock etc. Co.* v. *County of Los Angeles, supra,* 43 Cal.2d 121, 127, 272 P.2d 4; *City of Los Angeles* v. *Gage* (1954) 127 Cal.App.2d 442, 454-460, 274 P.2d 34.) The determination of the length of a reasonable period of amortization is not merely a matter of accounting. "It is not required that the nonconforming property concerned

have no value at the termination date." (*Art Neon Co.* v. *City and County of Denver* (10th Cir. 1973) 488 F.2d 118, 121.) The determination instead involves a process of weighing the public gain to be derived from a speedy removal of the nonconforming use against the private loss which removal of the use would entail. (*Hadacheck* v. *Sebastian* (1915) 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348; *Art Neon Co.* v. *City and County of Denver, supra,* at p. 121; *National Advertising Co.* v. *County of Monterey, supra,* at p. 886, 83 Cal.Rptr. 577, 464 P.2d 33 (dis. opn. of Sullivan, J.); *City of La Mesa* v. *Tweed & Gambrell Planning Mill* (1956) 146 Cal.App.2d 762, 770, 304 P.2d 803; *City of Los Angeles* v. *Gage, supra,* at p. 461, 274 P.2d 34; *Modjeska Sign Studios, Inc.* v. *Berle* (1977) 43 N.Y.2d 468, 402 N.Y.S. 2d 359, 373 N.E.2d 255.)[30]

In reviewing the constitutionality of an ordinance providing for amortization of nonconforming billboards we held in *National Advertising Co.* v. *County of Monterey, supra,* 1 Cal.3d 875, 83 Cal.Rptr. 577, 464 P.2d 33, that a one-year amortization period was unreasonable except as to signs which had been fully depreciated for federal income tax purposes. (*Id.,* p. 880, 83 Cal.Rptr. 577, 464 P.2d 33.) Other decisions have also stated that a one-year amortization period is generally unreasonable (*National Advertising Co.* v. *County of Monterey, supra,* 211 Cal.App.2d 375, 381, 27 Cal.Rptr. 136; *City of Santa Barbara* v. *Modern*

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[30] In determining the reasonableness of the period of amortization a great variety of factors may be relevant. As listed in *Art Neon Co.* v. *City and County of Denver, supra,* 488 F.2d 118, 122, the factors include "[T]he nature of the nonconforming use, the character of the structure, the location, what part of the individual's total business is concerned, the time periods, salvage, depreciation for income tax purposes, and depreciation for other purposes, and the monopoly or advantage, if any, resulting from the fact that similar new structures are prohibited in the same area."

Neon Sign Co. (1961) 189 Cal.App.2d 188, 195-196, 11 Cal. Rptr. 57), but have upheld amortization periods ranging from two years and eight months (*People ex rel. Dept. Pub. Wks.* v. *Adco Advertisers* (1973) 35 Cal.App.3d 507, 513, 110 Cal.Rptr. 849), to three years (*City of Escondido* v. *Desert Outdoor Advertising, Inc., supra,* 8 Cal.3d 785, 106 Cal.Rptr. 172, 505 P.2d 1012; *Naegele Outdoor Adv. Co.* v. *Village of Minnetonka* (1968) 281 Minn. 492, 162 N.W.2d 206), to five years (*Art Neon Co.* v. *City and County of Denver, supra,* 488 F.2d 118, 122; *County of Santa Barbara* v. *Purcell, Inc., supra,* 251 Cal.App.2d 169, 59 Cal.Rptr. 345; *E. B. Elliott Adv. Co.* v. *Metropolitan Dade County, supra,* 425 F.2d 1141, 1154). In light of those decisions we conclude that the amortization period provided in the instant ordinance which ranges from one to four years, depending upon the depreciated value of the sign, is not unreasonable on its face.

Our conclusion that the amortization schedule established in the San Diego ordinance is not facially unreasonable does not demonstrate its validity as applied to each of plaintiffs' signs. The reasonableness of an amortization period as applied to each billboard depends in part upon facts peculiar to that structure (see *National Advertising Co.* v. *County of Monterey, supra,* 1 Cal.3d 875, 879, 83 Cal.Rptr. 577, 464 P.2d 33, and cases there cited; *Bohannan* v. *City of San Diego* (1973) 30 Cal.App.3d 416, 426, 106 Cal.Rptr. 333). Such facts include the cost of the billboard, its depreciated value, remaining useful life, the length and remaining term of the lease under which it is maintained, and the harm to the public if the structure remains standing beyond the prescribed amortization period.

Plaintiffs have the burden of proving the invalidity of the amortization period as applied to each of plaintiffs'

structures. (See *Art Neon Co.* v. *City and County of Denver, supra,* 488 F.2d 118, 121; *National Advertising Co.* v. *County of Monterey, supra,* 1 Cal.3d 875, 879, 83 Cal.Rptr. 577, 464 P.2d 33.) On motion for summary judgment plaintiffs did not attempt to meet this burden as to each structure, but limited their argument to the claim that the abatement schedule was facially unconstitutional because it was not based upon the fair market value or remaining useful life of the billboard. But even though the fair market value and remaining useful life are relevant considerations—they are among the factors which must be evaluated in defining the private loss which is balanced against the public benefit in order to determine the reasonable period of amortization—the failure of the city to base its abatement schedule upon such considerations does not necessarily render that schedule unconstitutional. If the amortization period prescribed by the ordinance is a reasonable one, the fact that the city arrived at that period by a formula which did not include every one of the relevant considerations does not render its ordinance unconstitutional.[31]

As we have stated, on their motion for summary judgment plaintiffs did not attempt to prove the amortization period was unreasonable as applied to specific signs, except for those signs located within 500 feet of freeways and scenic highways for which this ordinance prescribed an amortization period of only 90 days. The city explains, however, that such signs were already nonconforming uses pursuant to an ordinance enacted more than three years

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[31] Even if the amortization period were found to be unreasonable as to a particular property, that finding would "not invalidate its application to other property or invalidate the ordinance of which it is a part." (*Bohannan* v. *City of San Diego, supra,* 30 Cal.App.3d 416, 426, 106 Cal.Rptr. 333, 339.)

earlier and consequently that plaintiffs had already enjoyed an amortization period of three years with respect to such signs. Plaintiffs' evidence fails to demonstrate that an amortization period of three years and ninety days is unreasonably short as applied to any of the signs in question. We therefore conclude that the summary judgment in favor of plaintiffs cannot be sustained on the ground that the amortization period of the ordinance is unreasonable as to all or any of plaintiffs' billboards.

7. *The summary judgment cannot be sustained on the ground that the City Council of San Diego failed to comply with the California Environmental Quality Act.*

Plaintiffs contend that Ordinance No. 10795 is invalid because the city council failed before enacting that ordinance to prepare an environmental impact report as required by Public Resources Code section 21151. Plaintiffs' complaints, however, do not allege the city's noncompliance with the requirements of the California Environmental Quality Act, and although over three years elapsed between the filing of those complaints and plaintiffs' motion for summary judgment, plaintiffs offered no amendment to assert such noncompliance. On motion for summary judgment the pleadings define the issues; thus "'[I]n the absence of some request for amendment there is no occasion to inquire about possible issues not raised by the pleadings.'" (*Krupp* v. *Mullen* (1953) 120 Cal.App.2d 53, 57, 260 P.2d 629, 632; *Gardenswartz* v. *Equitable etc. Soc.* (1937) 23 Cal.App.2d Supp. 745, 752, 68 P.2d 322; see *Dawson* v. *Rash* (1958) 160 Cal.App.2d 154, 161, 324 P.2d 959.) The issue of the city's alleged noncompliance with the California Environmental Quality Act therefore was

not properly before the trial court on the motion for summary judgment, and thus cannot be asserted here as a ground for sustaining that judgment.

8. *Conclusion.*

In summary, we conclude that neither the federal nor the state Constitution bars a municipality from enacting a zoning ordinance which prohibits off-site billboards and requires removal of existing billboards after expiration of a reasonable amortization period. The Outdoor Advertising Act, however, preempts local law to bar the uncompensated removal of existing billboards located within 660 feet of federal interstate or primary highways. Plaintiffs accordingly may avoid uncompensated removal for any billboards falling within the preemptive scope of the Outdoor Advertising Act; plaintiffs also retain the right to show that the amortization period prescribed by the San Diego ordinance is unreasonably short as applied to some or all of their structures. Because plaintiffs have failed to demonstrate the invalidity of the ordinance on its face, however, the trial court erred in granting their motion for summary judgment.

To hold that a city cannot prohibit off-site commercial billboards for the purpose of protecting and preserving the beauty of the environment is to succumb to a bleak materialism. We conclude with the pungent words of Ogden Nash:

"I think that I shall never see
"A billboard lovely as a tree.
"Indeed, unless the billboards fall,
"I'll never see a tree at all."

The judgment is reversed.

BIRD, C. J., and MOSK and MANUEL, JJ., concur.

RICHARDSON, Justice, concurring.

I concur in the judgment. I share some of the substantial doubts raised by the dissent of Justice Clark, who discerns serious constitutional difficulties with any governmental scheme calling for the total prohibition of any legitimate business enterprise. Nonetheless, I am persuaded by the majority's analysis that the present ban on off-site billboards meets the minimum constitutional standards established by the United States Supreme Court and that, accordingly, the challenged ordinance must be upheld.

The high court has recently dismissed for want of a substantial federal question an appeal which raised identical issues. In *Suffolk Outdoor Adv. Co., Inc.* v. *Hulse* (1977) 43 N.Y.2d 483, 402 N.Y.S.2d 368, 373 N.E.2d 263, the New York Court of Appeals upheld a local ordinance totally banning all off-site billboards as a rational method of improving community aesthetics. The majority herein correctly observes that the subsequent dismissal of the appeal to the United States Supreme Court must be regarded as a dispositive decision on the merits. (*Hicks* v. *Miranda* (1975) 422 U.S. 332, 343-344, 95 S.Ct. 2281, 2288-2289, 45 L.Ed.2d 223, 235-236.) No convincing basis appears for distinguishing *Suffolk*. Accordingly, I agree with the judgment of reversal.

NEWMAN, Justice, concurring.

I share Justice Richardson's unease regarding the prohibition that Justice Clark finds illegal. Unlike both of them, however, I believe that we must examine carefully the state as well as the federal Constitution.

Article I, section 2 of the California Constitution declares: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

That second sentence is imperative. By no means does it imply that federal precedents confine freedom of expression in this state. (See art. I, § 24: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution"; *Wilson* v. *Superior Court* (1975) 13 Cal.3d 652, 658, 119 Cal.Rptr. 468, 472, 532 P.2d 116, 120 ("A protective provision more definitive and inclusive than the First Amendment is contained in our state constitutional guarantee . . ."); Note, *Rediscovering the California Declaration of Rights* (1974) 26 Hastings L.J. 481.)

Notwithstanding Ogden Nash's poignant dictum (see next-to-last sentence of the majority opinion), I am not persuaded that this court should defer to city officials' views that one mode of communication in the city should be outlawed because it seems "particularly unsightly and intrusive" (maj. opn., p. 521 of 164 Cal.Rptr., p. 418 of 610 P.2d).

Some limits on time, place, and manner are of course permissible. Yet as the majority suggest (see their fn. 16), other varieties of speech indeed may merit more protection than is accorded "commercial speech." Further, I stress the brief reminder in footnote 14 of the majority opinion that an individual advertiser "retains the ability to assert that, owing to the absence of reasonable alternative means of communication, the ordinance cannot constitutionally *be applied* to prevent him from using a billboard to proclaim his message." (Cf. the exhibits in Annex A of the amicus brief filed here on August 27, 1979.)

The ordinance here ought to be redrafted. I hope the drafters will not feel too circumscribed by the majority's footnote 2, which purports (with no citation of legislative history) to proscribe signs that "clearly fall within the intendment of the enactment." Those signs are distinguished from "less obtrusive, noncommercial signs that present no significant aesthetic blight or traffic hazard." Then, in order to articulate that distinction, a definition in the Revenue and Taxation Code is endorsed somewhat heroically.

I find in the record no evidence that San Diego lawmakers would have adopted or would now adopt that cryptic, tax-based definition. What about hillside displays and cloth or plastic banners, for example, and signs painted on fences and on the walls of warehouses, barns, other buildings: Are they "rigidly assembled sign[s], display[s], or device[s] permanently affixed . . . or permanently attached" within the endorsed definition? Yet they seem to be "outdoor advertising display signs" within the meaning of the ordinance, and many of them would have some permanence. Also, what happens if a large rather than "a small sign placed in one's front yard" announces a political or religious message or a labor dispute? (Cf. the final sentence of the first paragraph in the majority's fn. 2.)

Those kinds of borderline issues do seem solvable, and thus I concur in the reversal of the judgment.

CLARK, Justice, dissenting.

I dissent. The San Diego ordinance unconstitutionally prohibits speech protected by the First Amendment. Because the ordinance must be considered a nullity, other issues are not reached.

The outdoor sign or symbol is a venerable medium for expressing political, social and commercial ideas. From the

poster or "broadside" to the billboard, outdoor signs have played a prominent role throughout American history, rallying support for political and social causes. (See Davidson, Propaganda and The American Revolution (1941) U.N.C. Press; Houck, Outdoor Advertising: History and Regulation (1969) U.Notre Dame Press.) The majority today call for absolute prohibition of this expression in violation of the First Amendment. (*Bates* v. *State Bar of Arizona* (1977) 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810; *Linmark Associates, Inc.* v. *Township of Willingboro* (1977) 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155; *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council* (1976) 425 U.S. 748, 96 S.Ct., 1817, 48 L.Ed.2d 346; *Bigelow* v. *Virginia* (1975) 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600; *Welton* v. *City of Los Angeles* (1976) 18 Cal. 3d 497, 134 Cal.Rptr. 668, 556 P.2d 1119.)

The briefs before us reveal political, cultural and social messages on San Diego billboards that encourage the 55 mph speed limit and safety seatbelt; protest involvement in the United Nations and Vietnam; blast rising taxes; condemn assassination of the Israeli delegation to the Munich Olympic Games. All such communication is protected by the First Amendment. Commercial communication may be restricted by government only after considering informational value to the public, adequate alternative means for dissemination, and state interest. (*Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, supra,* 425 U.S. 748, 770, 96 S.Ct. 1817, 1829, 48 L.Ed.2d 346; *Ohralik* v. *Ohio State Bar Assn.* (1978) 436 U.S. 447, 455-456, 98 S.Ct. 1912, 1918-19, 56 L.Ed.2d 444.) But the issue before us is not scope of permissible regulation of commercial thought. By written stipulation the parties have agreed on the valuable content of materials

displayed on outdoor signs the ordinance would prohibit. The stipulation provides that plaintiffs' signs "are located in areas zoned for commercial and industrial purposes"; that outdoor advertising "produces numerous direct and indirect benefits to the public"; and that "[*v*]*aluable commercial, political and social information is communicated to the public through the use of outdoor advertising.* Many businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive." (Joint Stipulation of Facts Nos. 20, 28, *ante,* p. 514 of 164 Cal. Rptr., p. —— of —— P.2d; italics added.) As applied in this case, the ordinance clearly prohibits expression of political, social and commercial thought. The ordinance must therefore satisfy the most stringent rules flowing from the First Amendment.

In spite of the stipulation, and without scrutiny of the effect on protected speech, the majority grandly uphold the San Diego ordinance. The majority's withdrawal from this court's recent and unanimous decision in *Welton* v. *City of Los Angeles, supra,* 18 Cal.3d 497, 134 Cal.Rptr. 668, 556 P.2d 1119, by effectively ignoring it, is particularly significant and distressing.

Under a municipal ordinance not unlike that before us today, the City of Los Angeles prosecuted Mrs. Welton for sidewalk sale of maps revealing the homes of movie stars. When challenged as an invasion of Mrs. Welton's First Amendment rights, the city contended her commercial activity constituted unprotected speech. In holding the ordinance could not be constitutionally applied to Mrs. Welton, we stated: "The fact that some may view the map as lacking opinion, newsworthiness or information of social worth, is constitutionally irrelevant. . . . Mrs. Wel-

ton and her maps are entitled to the same First Amendment protection as the political candidate and his political pamphlet." (*Id.*, at p. 504, 134 Cal.Rptr. at p. 671, 556 P.2d at p. 1122.)

Using both stale and distinguishable cases, the majority attempt to justify the ordinances' blanket prohibition by claiming (1) outdoor signs are not entitled to the same protection as other speech, (2) governmental interests here outweigh any First Amendment interest involved, and (3) "probable" alternative means exist for plaintiffs to communicate public messages.

Cases cited by the majority *predating* recognition of First Amendment protection of commercial speech, upholding zoning ordinances prohibiting off-site billboards, are of no precedential value. Those cases assumed commercial communication lacks First Amendment protection and failed to recognize signs might be used for noncommercial messages. (See, *Markham Advertising Co.* v. *State* (1968) 73 Wash.2d 405, 429, 439 P.2d 248; *Murphy, Inc.* v. *Westport* (1944) 131 Conn. 292, 302, 40 A.2d 177; *Matter of Cromwell* v. *Ferrier* (1967) 19 N.Y.2d 263, 270, 279 N.Y.S.2d 22, 27, 225 N.E.2d 749, 753; *Howard* v. *State Dept. of Hwys. of Colorado* (10th Cir. 1973) 478 F.2d 581, 584; *United Advertising Corp.* v. *Borough of Raritan* (1952) 11 N.J. 144, 152, 93 A.2d 362.)

Further, cases relied on by the majority decided following recognition of First Amendment protection of commercial speech (see, *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, supra,* 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346; *Bigelow* v. *Virginia, supra,* 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600) are clearly distinguishable from the case at bench.

Contrary to majority assertion (*ante,* pp. 520-521 of 164 Cal.Rptr., pp. 417-418 of 610 P.2d), *Suffolk Outdoor Advertising Co., Inc.* v. *Hulse* (1977) 43 N.Y.2d 483, 402 N.Y.S.2d 368, 373 N.E.2d 263, does not resolve the issue of whether the San Diego ordinance violates the First Amendment. Examination of *Suffolk* reveals the New York Court of Appeals devoted a scant paragraph to the First Amendment, summarily determining the ordinance in question was not a regulation based on content, and operative alternative means such as accessory or on-premise billboards existed for outdoor advertising. *Suffolk* does not deal with the issue of whether the ordinance curtailed noncommercial thought similar to the communication stipulated to in this case, so does not examine the availability of adequate alternatives. Thus, while of some precedential value on the issue of permissible regulation of commercial ideas, *Suffolk* does not address the critical issue faced by this court: whether noncommercial as well as commercial speech can be constitutionally restricted in the manner provided in the ordinance.[1]

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[1] The majority view the Supreme Court dismissal of appeal in *Suffolk* as indicating that court's approval of the prohibition of off-site billboards. (*Ante,* p. 517 of 164 Cal.Rptr., p. 414 of 610 P.2d; citing *Hicks* v. *Miranda* (1975) 422 U.S. 332, 343-345, 95 S.Ct. 2281, 45 L.Ed.2d 223.)

The majority's one-paragraph analysis of *Suffolk* (*ante,* pp. 520-521 of 164 Cal.Rptr., pp. 417-418 of 610 P.2d) based on only a one-line Supreme Court order, itself based on a one-paragraph discussion by the New York Court of Appeals summarily determining there are adequate alternatives while focusing only on advertising alternatives, is not the type of close scrutiny mandated by the First Amendment in limiting speech.

Further, summary dismissals are of only limited precedential value and do not carry the full weight of a Supreme Court ruling after full briefing and argument and certainly do not endorse any matter not considered by the opinion below. (*Washington* v. *Confederate Bands and Tribes* (1979) 439 U.S. 463, 477, fn. 20, 99 S.Ct. 740, 749, 58 L.Ed.2d 740.)

Other cases relied on by the majority, while upholding banning of billboards, exempt noncommercial messages from the ban. (*John Donnelly & Sons* v. *Mallar* (1978) 453 F.Supp. 1272, 1280; *Donnelly & Sons, Inc.* v. *Outdoor Advertising Board* (1975) 369 Mass. 206, 339 N.E.2d 709, 721; *Newman Signs* v. *Hjelle* (1978) 268 N.W.2d 741, 760-762.) Such cases have no precedential value when, as here, the ordinance includes noncommercial thought.

Still other cases relied on by the majority uphold restrictions on billboards because they were banned only in one area but permitted in other areas of the community. (*Donnelly Advertising Corp.* v. *City of Baltimore* (1977) 279 Md. 660, 370 A.2d 1127, 1132 (urban renewal ordinance banning billboards only in the renewal area of the city); *Lubbock Poster Co.* v. *City of Lubbock* (Tex.Civ.App. 1978) 569 S.W.2d 935, 945 (ordinance did not totally prohibit billboards but rather regulated only the location, size, separation and height); *State* v. *Lotze* (1979) 92 Wash.2d 52, 593 P.2d 811, 813 (Washington State Advertising Control Act prohibited billboards along scenic highways but permitted them in commercial and industrial areas).) In contrast, the San Diego ordinance constitutes a total ban on all off-site billboards anywhere in the City of San Diego.

Billboards Are Entitled to the Same First Amendment Protection as Other Forms of Speech

First Amendment protection extends to virtually all media utilized to disseminate ideas. (*Erzoznik* v. *City of Jacksonville* (1974) 422 U.S. 205, 95 S.Ct. 2268, 45 L.E. 2d 125 (drive-in movies); *Police Department of Chicago* v. *Mosley* (1972) 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (picketing); *Schneider* v. *State* (1939) 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (leafletting); *Welton* v. *City of*

Los Angeles, supra, 18 Cal.3d 497, 134 Cal.Rptr. 668, 556 P.2d 1119 (roadside sale of maps); *Dulaney* v. *Municipal Court* (1974) 11 Cal.3d 77, 112 Cal.Rptr. 777, 520 P.2d 1 (posting signs on public utility poles); *Dillon* v. *Municipal Court* (1971) 4 Cal.3d 860, 94 Cal.Rptr. 777, 484 P.2d 945 (demonstrations and parades); *Wollam* v. *City of Palm Springs* (1963) 59 Cal.2d 276, 29 Cal.Rptr. 1, 379 P.2d 481 (sound trucks); *California Newspaper Publishers Assn., Inc.* v. *City of Burbank* (1975) 51 Cal.App.3d 50, 123 Cal. Rptr. 880 (newspaper racks).) "The right of free speech necessarily embodies the means used for its dissemination because the right is worthless in the absence of a meaningful method of its expression. To take the position that the right of free speech consists merely of the right to be free from censorship of the content rather than any protection of the means used, would, if carried to its logical conclusion, eliminate the right entirely." (*Wollam* v. *City of Palm Springs, supra,* 59 Cal.2d 276, 284, 29 Cal. Rptr. 1, 6, 379 P.2d 481, 486.)

In addressing their first basis in justification of the San Diego ordinance's blanket prohibition—outdoor signs are not entitled to the same protections as other forms of speech—the majority attempt to distinguish outdoor signs from "other forms of communication which courts have held can be subjected only to narrowly drawn regulations serving a compelling governmental interest" (e. g., leafletting, sound trucks, etc.) because an outdoor sign is a "large, immobile and permanent structure" as opposed to "more transitory [and] less obtrusive media." (*Ante,* p. 522 of 164 Cal.Rptr., p. 419 of 610 P.2d.) Such distinction suffers the same overbreadth as the ordinance itself. While the ordinance may seek to prohibit small, unobtrusive *off-site* signs, it permits obtrusive and perhaps even

offensive *on-site* billboards. Being equally inconsistent, the majority selectively sustain the prohibition of "offensive" billboards but support the use of sound trucks, picketing, leafletting and demonstrations as constituting "more transitory or less obtrusive media."

Obtrusiveness does not justify total prohibition of protected expression. In *Erzoznik* v. *City of Jacksonville supra,* 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125, the Supreme Court struck down a city ordinance prohibiting exhibition of a motion picture displaying the bare female body by a drive-in theater whose screen was visible from a public street. Off-site advertising hardly commands the same attention as the "unique type of eye-catching display" of an animated drive-in movie (*id.,* at p. 222, 95 S.Ct. at p. 2279; Burger, C. J., dis.), yet the court noted "the screen of a drive-in theater is not 'so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it.'" (*Id.,* at p. 212, 95 S.Ct. at p. 2274.)

Obtrusiveness is thus measured by not only quality or degree of offensive intrusion, but also by the ability of the offended to avoid it. Is it not fair to assume that a display of animated nudes on a screen constitutes an intrusion of greater degree than a motionless sign or symbol advertising some product? Yet the Supreme Court did not find the nude display so offensive that its effect could not be kept within permissible limits. Off-site displays also are not so offensive that they cannot be kept within reasonable limits.

While obtrusiveness may be a factor to be weighed in the balance in determining whether a restriction is reasonable as to time, place and manner, the majority fail to even attempt a balance. Rather, they use obtrusiveness as a sole reason, a la Ogden Nash, for the blanket ban on billboards.

In instances when obtrusiveness has been deemed a factor justifying billboard regulation, the courts were persuaded by other considerations, such as the discredited view that the Constitution did not protect commercial speech, or that only those billboards next to interstate and state highways should be banned. (*General Outdoor Advertising Co.* v. *Department of Public Works* (1935), 289 Mass. 149, 193 N.E. 799, 803-804, 814; *Markham Advertising Co.* v. *State* (1968) 73 Wash.2d 405, 428-429, 439 P.2d 248.) In this case, obtrusiveness must be balanced against constitutional protection given noncommercial as well as commercial uses of billboards, and the total ban of the San Diego ordinance. These factors compel the conclusion the ordinance is overbroad, constituting an impermissible infringement on First Amendment protections.

GOVERNMENTAL INTERESTS DO NOT JUSTIFY THE ORDINANCE'S INFRINGEMENT ON FIRST AMENDMENT RIGHTS

The majority assert as their second justification for blanket prohibition that the balance must be tilted in favor of governmental interests, resulting in imbalance.

While recognizing that aesthetic beauty and traffic safety are legitimate police power objectives, the majority fail to show these interests outweigh First Amendment rights of plaintiffs, advertisers and the viewing public.[2] The conflict between police powers on the one hand and First Amendment rights on the other must seek compromise, allowing government to reasonably regulate the time, place

[2] It is well-settled that the right to receive "information of potential interest and value" is protected by the First Amendment. (*Bigelow* v. *Virginia, supra,* 421 U.S. 809, 822, 95 S.Ct. 2222, 2232, 44 L.Ed.2d 600; see also, *Stanley* v. *Georgia* (1969) 394 U.S. 557, 564, 89 S.Ct. 1243, 1247, 22 L.Ed.2d 542.)

and manner in which First Amendment rights may be exercised. (*Grayned* v. *City of Rockford* (1972) 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222; *Healy* v. *James* (1972) 408 U.S. 169, 92 S.Ct. 2338, 33 L.Ed.2d 266; *Welton* v. *City of Los Angeles, supra,* 18 Cal.3d 497, 134 Cal.Rptr. 668, 556 P.2d 1119; *Burton* v. *Municipal Court* (1968) 68 Cal.2d 684, 68 Cal.Rptr. 721, 441 P.2d 281; *Wollam* v. *City of Palm Springs, supra,* 59 Cal.2d 276, 29 Cal.Rptr. 1, 379 P.2d 481.) Thus government may validly regulate the use of newsracks (*Kash Enterprises, Inc.* v. *City of Los Angeles* (1977) 19 Cal.3d 294, 138 Cal.Rptr. 53, 562 P.2d 1302), sound trucks (*Kovacs* v. *Cooper* (1949) 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513), street sales of goods or merchandise (*Welton* v. *City of Los Angeles, supra,* 18 Cal.3d 497, 134 Cal.Rptr. 668, 556 P.2d 1119), and the operation of "adult" movie theaters (*Young* v. *American Mini Theatres* (1976) 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310). Similarly, off-site advertising signs may be reasonably regulated.

Notwithstanding the state's power to regulate, such power "does not necessarily sanction the outright prohibition." (*Wollam* v. *City of Palm Springs, supra,* 59 Cal.2d 276, 284, 29 Cal.Rptr. 1, 6, 379 P.2d 481, 486.) To be constitutionally reasonable, regulation of time, place or manner must be written narrowly and explicitly, in furtherance of a legitimate police power purpose. (*Welton* v. *City of Los Angeles, supra,* 18 Cal.3d 497, 134 Cal.Rptr. 668, 556 P.2d 1119.) But here the majority push police power objectives so far from center balance as to abolish protected speech. The *absolute prohibition* of off-site signs is justified by neither community appearance nor traffic improvement. Furthermore, the ordinance—written in terms of total prohibition—is not susceptible to interpre-

tation avoiding constitutional infirmity. (See *Welton* v. *City of Los Angeles, supra,* 18 Cal.3d 497, 134 Cal.Rptr. 668, 556 P.2d 1119.)

Further, in support of the conclusion that the city's interest in regulating commercial use of property justifies the instant ordinance the majority mistakenly rely on *Young* v. *American Mini Theatres, supra,* 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310. While upholding a zoning ordinance restricting the location of "adult" theaters, *Young* was careful to observe the First Amendment protection of such communication from total suppression. While *Young* affirms the proposition that commercial speech acquires a lesser degree of constitutional protection than other more traditionally protected varieties of thought (*id.,* at p. 68, 96 S.Ct. at p. 2451. *Ohralik* v. *Ohio State Bar Assn., supra,* 436 U.S. 447, 455-456, 98 S.Ct. 1912, 1918-19, 56 L.Ed.2d 444), the statute was upheld in part because it did not completely ban theaters from the city. Instead, theaters were restricted to areas more than 500 feet beyond residential areas and 1,000 feet beyond other adult establishments. In contrast, the San Diego ordinance bans billboards altogether.

Adequate Alternative Means of Dissemination of Speech Are Not Available

The third purported justification urged by the majority in support of the ordinance—existing "adequate alternative means" for advertisers to communicate their ideas—is likewise without merit. The parties' stipulation establishes that the ordinance will eliminate outdoor advertising, that outdoor advertising benefits the public in numerous ways,

and that politicians and others rely on outdoor advertising because other forms of advertising are "insufficient, inappropriate and prohibitively expensive." (See Joint Stipulation of Facts Nos. 2 and 28, *ante,* p. 514 of 164 Cal.Rptr., p. 411 of 610 P.2d.) Thus, in numerous situations, including the delivery of political messages, traditional off-site advertising is the only practical means of communicating.

The majority further rely on *John Donnelly & Sons* v. *Mallar, supra,* 453 F.Supp. 1272, as support for the proposition that alternative means of communicating such as on-premise advertising, official business directional signs, tourist information centers and publications justify the ordinance's prohibition against outdoor advertising. However, *Mallar* is limited to a ban on only *commercial* billboards: ". . . noncommercial messages such as those conveyed by political, civic and charitable signs, are specifically exempted from the broad ban on off-premises advertising." (*Id.,* at p. 1280.) *Mallar's* holding that existing alternatives justified a ban on commercial speech, while specifically exempting noncommercial messages from that holding, forecloses any argument that such alternatives would justify a ban on noncommercial messages as proposed by the broad San Diego billboard ban.

Recognizing freedom of speech entails not only communication, but effective communication, courts have refused to impose absolute prohibition of a medium when there exists no practical alternative. In our recent case of *Welton* v. *City of Los Angeles, supra,* 18 Cal.3d 497, 134 Cal.Rptr. 668, 556 P.2d 1119, we unanimously invalidated on First Amendment grounds an ordinance banning sidewalk and parkway sales of commercial books, magazines,

maps, and other constitutionally protected material despite readily apparent alternative methods of distribution. We noted the "city has failed to demonstrate that such a broad prohibition is necessary to the attainment of a legitimate police power purpose. Its interest in abating public nuisance cannot be pursued by means infringing personal liberties when less restrictive alternatives are available." (*Id.* at pp. 507-508, 134 Cal.Rptr. at p. 674, 556 P.2d at p. 1125.) In *Wollam* v. *City of Palm Springs, supra,* 59 Cal.2d 276, 29 Cal.Rptr. 1, 379 P.2d 481, we held unconstitutional an ordinance prohibiting use of stationary sound trucks where other methods including moving sound trucks were available. Similarly, in *Linmark Associates, Inc.* v. *Township of Willingboro, supra,* 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155, the Supreme Court rejected a contention that because ample alternative methods of communication existed, an ordinance prohibiting the posting of real estate "For Sale" and "Sold" signs should be sustained.[3]

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[3] The majority's statement that the "possibility that the ordinance may impede an occasional advertiser from communicating his message to the public, however, is not sufficient to invalidate the ordinance *on its face*" (*ante*, p. 522, fn. 14 of 164 Cal.Rptr., p. 419, fn. 14 of 610 P.2d), ignores both the joint stipulation of facts by which we are bound and traditional First Amendment overbreadth analysis. The parties' stipulation that many advertisers rely exclusively on outdoor advertising provides more than mere "possibility" that communication will be impeded. Furthermore, while the overbreadth doctrine may not apply with the same force in situations involving commercial speech (see *Bates* v. *State Bar, supra,* 433 U.S. 350, 380, 97 S.Ct. 2691, 2707, 53 L.Ed.2d 810), the instant ordinance affects social and political expressions as well as commercial speech. It is apparent, for instance, that political expression will be significantly curtailed although political campaign posters are authorized. The restriction to temporary signs, less efficient in terms of cost and effectiveness than the prohibited large and permanent display structures whose costs can be depreciated over long periods, will work to the detriment

There being no basis upon which the absolute prohibition of outdoor advertising can be justified, the judgment should be affirmed.

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of "the poorly financed causes of little people" (*Martin* v. *Struthers* (1943) 319 U.S. 141, 146, 63 S.Ct. 862, 865, 87 L.Ed. 1313), whose proponents are unable to afford other more costly mass media advertising.

APPENDIX B

Order Denying Rehearing

L.A. No. 30782

May 14, 1980

METROMEDIA, INC., et al.,

v.

CITY OF SAN DIEGO, et al.

Opinion modified.

Appellants' petition for rehearing DENIED.

/s/ BIRD
Chief Justice

APPENDIX C

Vacated Opinion of the Court of Appeal

JUDGE RICHARD B. AULT

February 11, 1977

METROMEDIA, INC., et al.,

Plaintiffs and Respondents,

v.

CITY OF SAN DIEGO, et al.,

Defendants and Appellants.

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4 Civ. No. 14591

(Sup. Ct. Nos. 332881
& 333292)

This appeal raises issues concerning the constitutionality of a city ordinance which prohibits the erection and maintenance of all off-premise advertising displays within the entire limits of a large metropolitan city. The validity of such sweeping legislation in this area has not been considered by an appellate court in California since 1909 (see *Varney & Green* v. *Williams,* 155 Cal. 318).

The City of San Diego appeals from a summary judgment declaring City Ordinance No. 10795 (New Series) unconstitutional and permanently enjoining the City from taking any steps to enforce the ordinance.[1] Separate actions

[1] Two sections of the ordinance were excepted from the judgment. These sections created special sign control districts in areas

attacking the ordinance by respondents Metromedia, Inc. and Pacific Outdoor Advertising, Inc. had been consolidated by stipulation. After extensive interrogatories and requests for admissions had been answered, all parties moved for summary judgment based upon a joint stipulation of facts, the pleadings and papers filed, and matters subject to judicial notice.

The respondent companies are engaged in the outdoor advertising business. Each of them owns a substantial number of outdoor advertising signs in San Diego which were lawfully erected and which have a substantial market value. On March 14, 1972 the San Diego City Council adopted Ordinance No. 10795 (New Series). As it relates to and affects respondents' businesses, the ordinance cuts a wide swath, prohibiting *all* off-premise outdoor advertising displays within the City and providing for the abatement of *all* such existing advertising displays over a four-year period.

Generally expressing the intent to promote safety, economic, aesthetic and general welfare interests, the ordinance first declares:

"A. Purpose and Intent

"It is the purpose of these regulations to eliminate excessive and confusing sign displays which do not relate to the premises on which they are located; to eliminate hazards to pedestrians and motorists brought about by distracting sign displays; to ensure that signing is used as identification and not as advertisement; and to pre-

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of the City known as La Jolla and Rancho Bernardo and regulated on-premise signs in those areas. They are not involved in this dispute.

serve and improve the appearance of the City as a place in which to live and work.

"It is the intent of these regulations to protect an important aspect of the economic base of the City by preventing the destruction of the natural beauty and environment of the City, which is instrumental in attracting nonresidents who come to visit, trade, vacation or attend conventions; to safeguard and enhance property values; to protect public and private investment in buildings and open spaces; and to protect the public health, safety and general welfare."

The ordinance next prohibits all outdoor advertising display signs in the City except signs which designate the owner or occupant of the premises upon which a sign is placed, identifying such premises or advertising goods manufactured or produced or services rendered on the premises upon which a sign is placed. Existing signs which do not meet the requirements of the ordinance are declared nonconforming, and the ordinance provides for the abatement of all such signs, based upon an adjusted market value. Under the ordinance the adjusted market value of a sign is computed upon the basis of its original cost, less ten percent of the original cost for every year a sign has been standing.

The abatement schedule provided in the ordinance is as follows:

"Adjusted Market Value		Abatement Date
Less than	$500.00	April 1, 1973
$ 500.00 to	999.99	July 1, 1973
1,000.00 to	1,499.99	October 1, 1973
1,500.00 to	1,999.99	January 1, 1974

2,000.00 to	2,999.99	April 1, 1974
3,000.00 to	3,999.99	July 1, 1974
4,000.00 to	4,999.99	October 1, 1974
5,000.00 to	7,499.99	January 1, 1975
7,500.00 to	9,999.99	April 1, 1975
10,000.00 to	12,499.99	July 1, 1975
12,500.00 to	14,999.99	October 1, 1975
15,000.00 to	19,999.99	January 1, 1976
20,000.00	and over	April 1, 1976"

Irrespective of adjusted market value, the ordinance requires the removal of all off-premise signs which can be viewed from a freeway, parkway or scenic highway within 90 days of its effective date. The ordinance makes no provision for compensation to the owners of the signs it requires to be removed.

The written stipulation of facts filed in the superior court was prefaced with this recital:

> "The parties to this litigation are filing cross-motions for summary judgment. This Stipulation of Facts is entered into for the purpose of these motions and for any judgment thereon or appeals therefrom and for no other purpose. The parties agree that the facts specified herein are true for said purpose only and none of the parties hereto shall be bound thereby for any other purpose."

The following pertinent facts (as originally numbered) were set forth in the written stipulation:

> '2. If enforced as written, Ordinance No. 10795 will eliminate the outdoor advertising business in the City of San Diego.

"13. Each of the plaintiffs are the owners of a substantial number of outdoor advertising displays (approximately 500 to 800) in the City of San Diego.

"14. Substantially all of the displays owned by plaintiffs are located on property leased by the owners thereof to the plaintiffs for the purposes of maintaining outdoor advertising displays thereon.

"15. Each of the displays were legally erected in full compliance with all applicable municipal and state laws and are in full compliance with such laws except for the contested legality of Ordinance No. 10795.

"16. The cost of producing and erecting each display was substantial.

"17. The displays have varying values depending upon their size, nature and location.

"18. Each of the displays has a fair market value, as a part of an income-producing system, of between $2,500 and $25,000.

"19. Each display has a remaining useful income-producing life in excess of 25 years.

"20. All of the signs owned by plaintiffs in the City of San Diego are located at areas zoned for commercial and industrial purposes.

"28. Outdoor advertising increases the sales of products and produces numerous direct and indirect benefits to the public. Valuable commercial, political and social information is communicated to the public through the use of outdoor advertising. Many businesses and politicians and other persons rely upon outdoor advertising

because other forms of advertising are insufficient, inappropriate and prohibitively expensive.

"29. Enforcement of Ordinance No. 10795, in addition to eliminating outdoor advertising within the City of San Diego, will adversely affect plaintiffs' businesses outside the City of San Diego in that many national or state-wide advertisers will be inclined to select other media capable of communicating with a wider segment of the consuming public, including San Diego, rather than selecting outdoor advertising which would be unable to communicate with the citizens of San Diego.

"31. Many of the plaintiffs' signs are within 660 feet and others are within 500 feet of Interstate or Federal Aid Primary highways and are designed to be viewed therefrom.

"34. 'The amortization provisions' of Ordinance No. 10795 have no reasonable relationship to the fair market value, useful life or income generated by the signs and were not designed to have such a relationship."

In their motion for summary judgment, respondents attacked the ordinance on seven grounds. The same issues are argued on appeal.

1. Is the ordinance an improper exercise of the police power?
2. Does the ordinance deprive respondents of their property without due process of law and without payment of just compensation as required by the Federal and California Constitutions?
3. Does the ordinance deny equal protection of the law?

4. Does the ordinance violate First Amendment guarantees of freedom of speech?
5. Is the ordinance invalid due to a conflict with or preemption by federal and state legislation?
6. Is the abatement schedule provided in the ordinance unconstitutional?
7. Is the ordinance invalid because of the City's failure to comply with the California Environmental Quality Act?

Before entering its judgment invalidating the ordinance and enjoining its enforcement, the trial court filed and entered its written Memorandum of Intended Ruling. Reference to the memorandum indicates the trial court predicated its judgment on two grounds: first, the ordinance was an unreasonable exercise of the police power; and, second, the ordinance violated First Amendment guarantees of freedom of speech.

Is Ordinance No. 10795 an Unreasonable Exercise of the Police Power?

Article XI, section 7, of the California Constitution expressly confers on cities and towns the power to make and enforce within their limits all local, police, sanitary and other ordinances and regulations not in conflict with the general laws. This power is as broad as that possessed by the Legislature itself where it is exercised within the confines of the City and is not in conflict with the state's general laws (*In re Maas,* 219 Cal. 422, 425; *Carlin* v. *City of Palm Springs,* 14 Cal. App. 3d 706, 711).

Within this grant of authority, local governments may promulgate zoning ordinances which regulate and restrict

land use. The power to enact and enforce such measures is inherent in the police power (*People* v. *Johnson,* 129 Cal. App. 2d 1, 5). It has long been recognized that the reasonable regulation of signs and billboards constitutes a valid exercise of the police power (*Carlin* v. *City of Palm Springs, supra,* 14 Cal. App. 3d 706, 712; *Metromedia, Inc.* v. *City of Pasadena,* 216 Cal. App. 2d 270, 273-274; *National Advertising Co.* v. *County of Monterey,* 211 Cal. App. 2d 375, 378).

While the legislative body of a city has broad discretion in determining what is reasonable in endeavoring to protect the health, safety, morals and general welfare of its citizens, the ordinances it enacts to accomplish these aims must be reasonable in object and not arbitrary in operation, for counterbalancing the public right is a property owner's right to make reasonable use of his property and the businessman's right to engage in lawful business (*Carlin* v. *City of Palm Springs, supra,* 14 Cal. App. 3d 706, 711-713). When reviewing legislation, challenged as an improper or unreasonable exercise of the police power, courts must be mindful that they are examining the act of a coordinate branch of the government, and the legislative power must be upheld "unless manifestly abused so as to infringe on constitutional guarantees." (*City of Los Angeles* v. *Gage,* 127 Cal. App. 2d 442, 451.)

Initially we reject, as did the trial court, respondents' claim the ordinance is invalid because it was enacted primarily to accomplish aesthetic purposes. In making this assertion respondents rely heavily on *Varney & Green* v. *Williams, supra,* 155 Cal. 318, a 1909 case in which the Supreme Court held, among other things, that aesthetic considerations *alone* do not justify the exercise of the police power to eliminate outdoor advertising displays.

As the City and its amici point out, *Varney & Green* was decided before the acceptance of comprehensive zoning as a valid exercise of the police power. Later California decisions have distinguished the earlier case by recognizing the inseparable interrelationship between aesthetic and economic considerations, holding that the combination of these and other similar factors may properly influence city officials in enacting measures affecting billboard advertising displays (*City of Escondido* v. *Desert Outdoor Advertising, Inc.*, 8 Cal. 3d 785, 790; *Desert Outdoor Advertising, Inc.* v. *County of San Bernardino*, 255 Cal. App. 2d 765, 769).

Here the stated, as well as the obvious, purpose of the ordinance was to promote highway safety and to secure economic benefits for the community, as well as to enhance community aesthetic values. The ordinance cannot be invalidated on the ground it was enacted solely or primarily for aesthetic purposes.

Our chief concern with the ordinance lies in its broad sweep. No California appellate decision has approved a municipal ordinance which prohibits all outdoor off-premises advertising displays throughout the entire area of a city. To the contrary, in *Varney & Green* v. *Williams, supra*, 155 Cal. 318, the only case considering an ordinance absolutely prohibiting the erection or maintenance of billboards for advertising purposes within the town limits, the Supreme Court held the ordinance invalid, stating in conclusion:

> "We are not here, however, concerned with the extent to which the legislative power may, in the effort to protect the public safety or morals, regulate the manner of erecting or using bill-boards. The ordinance in question does not attempt such regulation, but undertakes to absolutely forbid the erection or maintenance

> of any bill-board for advertising purposes. We have no doubt that this sweeping prohibition was beyond the power of the town trustees." (*Varney & Green* v. *Williams,* 155 Cal. 318, 321.)

The City asserts the holding of *Varney & Green* invalidating an ordinance totally prohibiting billboards as beyond the power of municipal authorities is no longer controlling. It again points out the case was decided before there was judicial acceptance of comprehensive zoning and that automobile traffic and urban congestion have vastly increased since 1909. Furthermore, the City contends the case was decided on the ground the ordinance involved was based solely on aesthetic considerations and that it has been distinguished by later California decisions.

Our reading of *Varney & Green* leads us to the conclusion the ordinance under consideration there was invalidated for two reasons: (1) because it was based solely on aesthetic considerations; and (2) because it did not attempt the regulation of billboards, but rather undertook "to absolutely forbid the erection or maintenance of any bill-board for advertising purposes." While, as we have pointed out, later California cases may be said to have modified the strict holding of *Varney & Green* as it relates to aesthetic considerations, none has sought to undercut its holding that a total ban on billboards for advertising purposes is beyond the power of municipal authorities. In *City of Escondido* v. *Desert Outdoor Advertising, Inc., supra,* 8 Cal. 3d 785, the ordinance in question prohibited all signs and advertising displays adjacent to freeways. In upholding the validity of the ordinance, the Supreme Court stated:

> "Moreover, City's ordinance does not purport to prohibit all signs and advertisements but only to regulate

> their location so that they do not constitute nuisances and for the obvious purposes of promoting highway safety as well as enhancing community aesthetic values. The case of *Varney & Green* v. *Williams,* 155 Cal. 318 . . ., is readily distinguishable. There the court held invalid an ordinance which forbade all advertising billboards within city limits. (See also *Metromedia, Inc.* v. *City of Pasadena,* 216 Cal. App. 2d 270, 273-274 . . . .)"

It is significant that the court in no way questioned its earlier holding but rather distinguished the limited regulatory aspect of the ordinance under consideration from the all-inclusive prohibitory features of the ordinance its earlier decision had condemned.[2]

Irrespective of the holding in *Varney & Green,* additional considerations compel us independently to conclude that the City's ordinance banning all off-premise outdoor advertising within its boundaries exceeds constitutional limits. In enacting and attempting to enforce Ordinance No. 10795, the City purports to act under its police power. It concedes the enforcement of the ordinance will eliminate the outdoor advertising business in the City of San Diego and will require respondents to remove hundreds of advertising display signs having a fair market value of millions of dollars,

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[2] Courts in other jurisdictions which have considered municipal ordinances totally banning outdoor advertising displays within the entire limits of a city have found such ordinances to be an unreasonable and arbitrary exercise of the police powers (cf. *Combined Communications Corporation* v. *City & Cty. of Denver,* 542 P. 2d 79 (Colo. 1975); *Norate Corporation* v. *Zoning Board of Adjustment,* 207 A. 2d 890 (Pa. 1965); *Daikeler* v. *Zoning Bd. of Adjust. of Montgomery Tp.,* 275 A. 2d 696 (Pa. 1971); *General Advertising Company* v. *City of Ann Arbor,* 218 N.W. 2d 27 (Mich. 1974).

all of which are located in commercial and industrial zones of the City, without payment of compensation.

The legitimate exercise of the police power does not run afoul of due process, and the fact that an individual, or his business or property, may sustain damage as the result of its proper exercise to protect the health, safety, morals and general welfare of the community does not entitle him to compensation. Damage brought about through the proper exercise of the police power is merely one of the prices an individual must pay as a member of society (*City of Los Angeles* v. *Gage, supra,* 127 Cal. App. 2d 442, 452-453).

While the grant empowering cities to exercise the police power is broad and has been uniformly interpreted by the courts to include the right to reasonably regulate outdoor advertising displays within their boundaries, it is not without limitation. Their power to enact and enforce ordinances in the exercise of the police power is limited to those ordinances which do not conflict with the general laws of the state (Cal. Const., art XI, §7).

In Business and Professions Code section 5226, the Legislature has stated:

> "The regulation of advertising displays adjacent to any interstate highway or primary highway as provided in Section 5405 is hereby declared to be necessary to promote the public safety, health, welfare, convenience and enjoyment of public travel, to protect the public investment in such highways, to preserve the scenic beauty of lands bordering on such highways, and to insure that information in the specific interest of the traveling public is presented safely and effectively, recognizing that a reasonable freedom to advertise is necessary to attain such objectives. The Legislature finds:

"(a) Outdoor advertising is a legitimate commercial use of property adjacent to roads and highways.

"(b) Outdoor advertising is an integral part of the business and marketing function, and an established segment of the national economy, and should be allowed to exist in business areas, subject to reasonable controls in the public interest."

Business and Professions Code section 5226 is a part of the Outdoor Advertising Act (Bus. & Prof. Code §5200 et seq.). Generally, the provisions of the act apply only to the unincorporated areas of the state:

". . . except that the placing of advertising displays within 660 feet from the edge of the right-of-way of, and the copy which is visible from, interstate highways or primary highways, *including the portions of such highways located in incorporated areas, shall be governed by this chapter.*" (Emphasis added.) (Bus. & Prof. Code §5271.)

The City has stipulated that many of respondents' signs are located within 660 feet of such highways in the City and that they are designed to be viewed from such highways. It has further stipulated that all of respondents' signs are located in areas zoned for commercial or industrial purposes. To the extent the City's ordinance completely bans and requires removal of all such signs, it is directly in conflict with Business and Professions Code section 5226, which states such signs ". . . should be allowed to exist, subject to reasonable controls in the public interest." [3]

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[3] Contrary to the City's contention, Business and Professions Code section 5230 does not operate to authorize its *total* ban of

Moreover, signs which abut interstate and primary highways are of state-wide concern because of their effect upon the state's right to federal highway funds. Undoubtedly the paramount legislative purpose prompting the California Legislature to enact the Outdoor Advertising Act was its concern not to lose California's share of federal highway funds and not to incur any penalty as a result of noncompliance with the Federal Highway Beautification Act (23 U.S.C. §131, et seq.). Under the Act a state must enact laws providing "effective control" of billboards or be subject to a penalty of 10% of its allocated federal highway funds during each year of noncompliance (23 U.S.C. §131(b)). Section 131(g) of the Act provides that just compensation shall be paid upon removal of any outdoor advertising sign, display, or device lawfully erected under state laws. Section 131(b)'s requirement that states provide "effective control" undoubtedly includes section 131(g)'s mandate for payment of "just compensation." (See 55 Ops. Atty. Gen. 1.) Thus enforcement of the City's ordinance requiring the removal of signs in this category without payment of compensation might well subject the State of California to the loss of 10% of the funds allocated by the federal government for highway construction purposes.

Equally as important as the considerations discussed above, and of broader impact, is the conceded fact that enforcement of the ordinance will eliminate the outdoor advertising business in the City of San Diego. A municipality's power to regulate lawful businesses may not be used

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advertising display signs. That section merely authorizes cities and counties to impose *restrictions* on such signs, equal or greater than those imposed by the Outdoor Advertising Act itself.

to eliminate them entirely *(City of Escondido* v. *Desert Outdoor Advertising, Inc., supra,* 8 Cal. 3d 785, 790; *Parker* v. *Colburn,* 196 Cal. 169, 176). This rule does not apply to a business whose operation constitutes a nuisance, inimical to the public welfare *(City of Escondido* v. *Desert Outdoor Advertising, Inc., supra,* 8 Cal. 3d 785, 790; *Sunset Amusement Co.* v. *Board of Police Commissioners,* 7 Cal. 3d 64, 80). Although the ordinance in question does not declare signs which violate its provisions to be a nuisance, the City seeks to come within the exception to the general rule by invoking another provision of its municipal code which declares all property uses in violation of code provisions to be public nuisances.

If the interrelation of the code sections has the effect of constituting signs in violation of the ordinance in question as nuisances, such a declaration would still be subject to the constitutional protection against unreasonable and arbitrary action on the part of the City (*People ex rel. Dept. Pub. Wks.* v. *Adco Advertisers,* 35 Cal. App. 3d 507, 519). The City's contention it may declare *all* outdoor advertising signs, no matter where located within its limits, to be nuisances, inimical to the public welfare, flies directly in the face of the contrary findings by the Legislature in Business and Professions Code section 5226 that:

> "(a) Outdoor advertising is a legitimate commercial use of property adjacent to roads and highways.
>
> "(b) Outdoor advertising is an integral part of the business and marketing function, and an established segment of the national economy, and should be allowed to exist in business areas, subject to reasonable controls in the public interest."

Appendix C—Vacated Opinion of the Court of Appeal

A business may be inherently lawful and still subject to regulation under the police power, but when a lawful business is regulated, and certainly where it is prohibited, it is a judicial question whether the law or ordinance is a lawful exercise of the police power (*McKay Jewelers, Inc.* v. *Bowron,* 19 Cal. 2d 595, 600). Here, we are not dealing with an ordinance which regulates or prohibits a few signs, or which affects only signs located in certain zones or areas of the City. Enforcement of the ordinance in question will require the removal of hundreds of signs having a conceded value in the millions of dollars. The facts before us indisputably show enforcement of the ordinance will bring about substantial private loss. While the stated purposes of the ordinance may be laudable, the City presents no convincing argument why the public benefits sought cannot be achieved by more reasonable and less drastic measures. The stipulated facts simply do not support the proposition that all off-premise advertising signs within the City are public nuisances, or that it is reasonably necessary to remove all of them to promote safety, general economic interests, or even aesthetic values. The ordinance is too broad, too general and too inclusive. We have no doubt the enactment ot the ordinance and its attempted enforcement is beyond the power of city officials and constitutes an unreasonable and arbitrary exercise of the police power.

This holding requires us to affirm the superior court's judgment and makes it unnecessary to consider whether the broad sweep of the ordinance also infringes upon First Amendment or Equal Protection rights or whether its a nortization provisions meet constitutional standards.

The judgment is affirmed.

APPENDIX D

Memorandum of Intended Ruling of the Superior Court

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO

JUDGE JACK R. LEVITT

May 27, 1975

No. 332881

METROMEDIA, INC., a corporation doing business as FOSTER AND KLEISER,

Plaintiff,

vs.

CITY OF SAN DIEGO, a municipal corporation, and DOES I through XX, inclusive,

Defendants.

No. 333292
Consolidated

PACIFIC OUTDOOR ADVERTISING CO., INC., an Arizona corporation,

Plaintiff,

vs.

THE CITY OF SAN DIEGO, a municipal corporation, THE CITY COUNCIL OF SAN DIEGO, VOYD BEIGHTS, Zoning Administrator of the City of San Diego and DOES 1 through 10, inclusive,

Defendants.

Plaintiff Pacific United Services Corporation has filed a complaint seeking declaratory relief and a temporary restraining order. Plaintiff Metromedia, Inc. has filed a com-

plaint seeking declaratory relief and a permanent injunction. Both plaintiffs engage in the outdoor advertising business in the City of San Diego. In March of 1974, the City of San Diego, defendant in both actions, enacted Ordinance Number 10795 which prohibits any offsite signs, and which provides an abatement schedule. The purposes set forth in the ordinance are: to eliminate excessive and confusing sign displays which do not relate to the premises on which they are located; to eliminate hazards to pedestrians and motorists brought about by distracting sign displays; to insure that signing is used as identification and not as advertisement; and to preserve and improve the appearance of the City as a place in which to live and work. The intent set forth in the ordinance is: to protect an important aspect of the economic base of the City by preventing the distraction of the natural beauty and environment of the City, which is instrumental in attracting nonresidents who come to visit, trade, vacation or attend conferences; to safeguard and enhance property values; to protect public and private investment in buildings and open spaces; and to protect the public health, safety and general welfare. In essence, the ordinance prohibits the outdoor advertising business throughout the City of San Diego and requires the removal, without compensation, of all outdoor advertising displays owned by the plaintiffs pursuant to the abatement schedule.

The parties filed cross-motions for summary judgment and submitted a stipulation of facts. The facts, too numerous to enumerate herein, set forth statistics regarding the City of San Diego relative to size, composition of citizenry, structures, facilities, employment, etc., together with information, general and economic, regarding outdoor advertising and the plaintiffs' outdoor advertising displays.

Appendix D—Memorandum of Intended Ruling of the Superior Court

Plaintiffs have challenged the validity of the ordinance on the following general grounds:

1. The ordinance is a total prohibition and confiscates a useful, legitimate business without payment of just compensation in violation of the Federal and California Constitutions.

2. The ordinance violates the First Amendment of the Federal Constitution.

3. The ordinance is in excess of the police power of the defendant in that such may not be exercised for aesthetic purposes.

4. The City Council did not comply with the requirements of the California Environmental Quality Act of 1970.

5. The ordinance is invalid and contrary to federal and state statutes due to pre-emption and the failure to pay compensation.

6. The abatement schedule is unconstitutional.

The defendant City contends that the ordinance is constitutional and is not in conflict with federal or state legislation, and that plaintiffs have no standing to raise the California Environmental Quality Act of 1970.

California Environmental Quality Act

The applicability of the California Environmental Quality Act is not an issue raised by the pleadings. Plaintiffs, by virtue of Section 21167 of the Public Resources Code, are barred from asserting the defendant's failure to comply therewith, since no action or proceeding was commenced within 180 days of the date of the adoption of the ordinance.

Appendix D—Memorandum of Intended Ruling of the Superior Court

Federal and State Legislation

The California legislature, when it enacted the Outdoor Advertising Act (Sections 5200, et seq., Business & Professions Code), while not relinquishing its police power to control billboards, specifically reserved the right to local entities to adopt legislation more restrictive than the act, which merely set minimum standards. See *City of Escondido* v. *Desert Outdoor Advertising, Inc.* (1973), 8 Cal. 3d 785, 788, N.3.

Plaintiffs contend that to enforce the ordinance would be to place the State in the position of being in violation of the Federal Highway Beautification Act of 1965 (Pub. L. & O. 89-285, 79 Stat. 1028, 23 U.S.C. Section 131, et seq.), which requires the states to pay just compensation for the removal of outdoor advertising devices erected on interstate or primary highways. Even assuming that the State Act precludes the defendant from requiring the removal of signs covered by the Federal Highway Beautification Act without paying just compensation, the City declared illegal all such signs prior to the effective date of the Federal Act. See San Diego Municipal Code Sections 95.0301-95.0323.

Abatement Schedule

Plaintiffs bear the burden of proving an amortization period is unreasonable. *National Advertising Company* v. *County of Monterey* (1962), 211 Cal.App.2d 375, 381. Whether an amortization period is reasonable depends upon the particular property in use in issue, and each case must be determined on its own facts. *Bohannan* v. *City of San Diego* (1973), 30 Cal.App.3d 416, 426. Judicially approved "amortization", as a means of termination of nonconforming uses, need not constitute true amortization or

depreciation in an accounting sense, and it is not required that the nonconforming property have no value at the termination date. *Art Neon Company* v. *City and County of Denver,* 488 F.2d 118 (C.A. 10th Cir. 1973). The evidence established that plaintiff has only average costs for its structures for the entire State of California, and thus cannot separate out initial construction costs from labor, materials and overhead costs incurred subsequent to initial construction. Moreover, prior to October 1970, the term for plaintiffs' leases for property for maintenance of its signs was generally ten years. Plaintiffs have not established the unreasonableness of the amortization period. Plaintiffs' contentions that the amortization provision constitutes the taking of property without just compensation will be discussed *infra.*

First Amendment

Plaintiffs contend that outdoor advertising is a media of communication which acts as a conduit for messages of a political and social nature, as well as commercial, and accordingly, the First Amendment, as imposed upon the states through the Fourteenth Amendment, denies to the City the right or power to abridge such activities. The City responds that the freedom of speech protected by the constitutional guaranties includes, in the main, freedom of expression on political, sociological, religious, and economic subjects, not commercial activities, to which speech is only an instance or means, citing *In re Porterfield* (1946), 28 Cal.2d 91, 101-102.

In *United Advertising Corporation* v. *Borough of Raritan* (1952), 11 N.J. 144, it was contended that there was an unconstitutional abridgement of the guaranties of the freedom of speech in a distinction which permitted a businessman to

use a sign to advertise his business upon the premises, although he could not use that same sign to urge the public to purchase any lawful article of commerce elsewhere. The Court held that the answer was that those guaranties imposed no such restraint upon governmental regulation of purely commercial advertising.

Howard v. *State Department of Highways of Colorado,* 478 F.2d 581 (10th Cir. 1973), has held that an attack on the Colorado Outdoor Advertising Act based on First Amendment grounds presented no substantial federal question. The court held, at Page 584:

> ". . . the Supreme Court has long sustained exercises of the police power of the states for regulation and prohibition of various forms of outdoor commercial advertising. . .".

On the other hand, a District Court, in and for the City and County of Denver, State of Colorado, in *Combined Communications Corporation, et al.* v. *City and County of Denver, et al.,* Civil Action Number C-41119, reasoned that:

> "Although some courts have stated that purely commercial speech does not fall within the protection of the First Amendment, *e.g., Valentine* v. *Chrestensen,* 316 U.S. 52 (1942), based on the evidence which has been submitted to this Court, this position seems untenable. First of all, it is clear that the outdoor advertising devices involved in this case perform a useful and substantial function in conveying commercial messages to the public as a whole. Secondly, it is equally clear that a sizable amount of the messages carried on the outdoor advertising structures are non-commercial in nature and, therefore, could be protected under any-

body's definition of free speech. Additionally, when the Colorado Supreme Court has stated that, 'The constitutional guarantee of freedom of speech and press protects not only the great literary works which we all revere, but also those questionable forms of literary expression which some of us abhor,' *People* v. *Berger*, 521 P.2d 1244 (Colo. 1974), and when the United States Supreme Court has held over and over again that all but the hard-core forms of sexual pornography are protected free speech, *Redrup* v. *New York*, 386 U.S. 767 (1967), it is difficult for this Court to conclude that the messages contained on billboards in Denver are not at least as protected as those forms.

"It is recognized that freedom of speech is not an unlimited right and that reasonable regulations may be placed upon that right. However, the United States Supreme Court has stated that regulation of the right of free speech must 'further an important or substantial governmental interest' and must be 'no greater than is essential to the furtherance of that interest.' *Procunier* v. *Martinez*, 94 S. Ct. 1800 (1974)."

This Court is persuaded by the facts of the instant case that sufficient noncommercial messages have been, and will be, carried on plaintiffs' outdoor advertising devices to require the Court, in order to uphold the validity of the ordinance, to find that the ordinance furthers an important or substantial governmental interest, and that total unavailability that would be created by the ordinance is unreasonable. This subject is discussed *infra*.

Taking of Private Property Without Just Compensation

Police power should not be confused with eminent domain, in that the former controls the use of property by

the owner for the public good, authorizing its regulation and destruction without compensation, whereas the latter takes property for public use and compensation is given for property taken, damaged or destroyed. *Tamm* v. *Volpe*, 449 F.2d 1202 (1971).

A proper distinction may be drawn between onsite and offsite signs. It is true that signs relating only to goods sold or services rendered upon the building site on which they are erected or maintained may, although strictly limited as to size and number, have the same appearance as offsite signs. A significant difference, however, is that the onsite sign is but a part of, and wholly incidental to, the business conducted upon the site. Offsite signs, on the contrary, constitute a wholly distinct business, that of outdoor advertising. *National Advertising Company* v. *County of Monterey, supra.* Further, offsite signs are used in a realistic sense only where the light reflected therefrom strikes the eyes of the users of the public streets or adjoining private property and the members of the public required to use such signs gain no benefit therefrom in the sense that they are thereby directed to the location of a business activity which they may be immediately desirous of patronizing. *Metromedia, Inc.* v. *City of Pasadena* (1963), 216 Cal.App.2d 270. The distinction between the two classes of signs, therefore, is not unreasonable, arbitrary or discriminatory in any constitutionally prohibited sense.

It has long been settled that the unique nature of outdoor advertising, and the nuisances fostered by billboards and similar outdoor structures located by persons in the business of outdoor advertising, justify the separate classification of such structures for the purposes of governmental

regulation and restriction. *United Advertising Corp.* v. *Borough of Raritan, supra.* Property, including business, may be regulated or prohibited in the exercise of the police power, and damage caused by the proper exercise of the police power is merely one of the prices an individual must pay as a member of society. An individual cannot complain of incidental injury if the police power is exercised for proper purposes, and without an arbitrary and unreasonable application in the particular case. *City of Los Angeles* v. *Gage* (1954), 127 Cal.App.2d 442. Thus, restrictions upon the use of property in an exercise of the police power for an authorized purpose do not constitute the taking of property without compensation. *People Ex Rel. Department of Public Works* v. *Adco Advertisers* (1973), 35 Cal.App.3d 507.

The ordinance in question is not an enactment pursuant to the exercise of the power of eminent domain, and thus plaintiffs' contentions respecting just compensation are rejected.

Police Power

It thus becomes necessary to determine if the ordinance is a reasonable exercise of the police power. A municipality may enact zoning ordinances which regulate and restrict land use. The power to enact and enforce such measures is inherent in the police power. *People* v. *Johnson* (1954), 125 Cal.App.2d 1. The authority emanates from Article XI, Section 7 of the California Constitution, which empowers a county or state to make and enforce within its limits all police, sanitary, and other ordinances and regulations not in conflict with general laws. The power thus delegated to municipalities is as broad as that of the legislature itself, providing the power is exercised within the confines of the

city and is not in conflict with the state's general laws. *Carlin* v. *City of Palm Springs* (1971), 14 Cal.App.3d 706, 711.

In the exercise of its police power the City has broad discretion in determining what is reasonable in endeavoring to protect the public health, safety, morals and general welfare. The test as to whether a law enacted pursuant to the police power is arbitrary and discriminatory in its conception and application is whether it has any reasonable tendency to promote the public health, morals, safety or general welfare of the community. *Carlin* v. *City of Palm Springs, supra.*

The reasonable regulation of signs and billboards constitutes a valid exercise of the police power. *National Advertising Company* v. *County of Monterey, supra; Carlin* v. *City of Palm Springs, supra.* Accordingly a business which, when established, was entirely unobjectionable, may, by the growth or change in the character of the neighborhood, become a source of danger to the public health, morals, safety, or general welfare of those who have come to be occupants of the surrounding territory. *City of Los Angeles* v. *Gage, supra.*

Plaintiffs rely heavily on the case of *Varney and Green* v. *Williams* (1909), 155 Cal. 318, for the proposition that an ordinance cannot entirely prohibit the erection or maintenance of billboards. Defendant contends that is no longer the law today, in view of subsequent decisions and the markedly changed conditions in our urban areas of today, as compared to those existing in 1909 when, for example, there was not even comprehensive zoning. *Varney and Green* held that an ordinance undertaking to absolutely forbid the erection or maintenance of any billboard for

advertising purposes was not a lawful exercise of the police power; was the damaging of property for which the owner is entitled to compensation; and that such restriction is not justified, even if billboards are, or may be, offensive to the sight of persons of a refined taste. Many changes involving environmental and legal reasoning have taken place since 1909. The courts of other jurisdictions have expressed varying viewpoints on the subject. The Court in *Exton Quarries, Inc.* v. *Zoning Board of Adjustment* (1967), 425 Pa. 43, invalidated such an ordinance, holding that the constitutionality of zoning ordinances, which totally prohibit legitimate businesses from an entire community, should be regarded with particular circumspection, because they cannot be premised on the fundamental reasonableness of allocating to each type of activity a particular location in the community. They reasoned that if one municipality may, with only moderate justification totally prohibit an undesired use of land, it is not unlikely that surrounding municipalities will do the same. Likewise in *Norate Corporation* v. *Zoning Board of Adjustment* (1965), 417 Pa. 397, the Court had invalidated a billboard ordinance as being "patently unreasonable and invalid"; however, the Court footnoted the case of *New York State Thru. Auth.* v. *Ashley Motor Court, Inc.* (1961), 210 N.Y.S. 2d 193, which validated an ordinance prohibiting advertising devices within certain distances of a throughway, and which held that the state's police power is a flexible, broad, variable process of government, intent upon keeping up-to-date with all of the public and social needs and that what would be a violation thereof in prior years might of necessity, in an ever-changing world, become legal in present-day society, while what may have been valid when enacted might become unlawful, as a result of later

events. The California courts have followed similar reasoning by holding that the police power is elastic and capable of expansion to meet existing conditions of modern life. *National Advertising Company* v. *County of Monterey, supra.* The Pennsylvania Court again disallowed a total ban of signs in the more recent case of *Amerada Hess Corporation* v. *Zoning Board of Adjustment* (1973), 11 Pa. Cmwlth. 115, holding that a municipality has no power to place a blanket prohibition on all revolving signs without any regard to location, size of signs or other considerations. The Court, updating its reasons, specified that, while in most cases involving the constitutionality of ordinances there is a presumption of constitutionality and the burden of proving otherwise is on the party so asserting, cases involving total prohibition receive different treatment. After referring to the Pennsylvania case of *Beaver Gasoline Company* v. *Osborne Borough* (1971), 445 Pa. 571, to the effect that, situations involving the total prohibition of otherwise legitimate land uses, an applicant meets his burden of overcoming the presumption of constitutionality by showing the total ban, the Court held that common experience indicates revolving signs are not per se noxious, and thus the showing of the total ban overcame the presumption of constitutionality.

It becomes necessary to consider plaintiffs' contentions regarding aesthetics before concluding whether the defendant City properly exercised its police power in this matter. Plaintiffs contend that the ordinance was enacted principally, if not solely, to accomplish aesthetic purposes, despite the purpose and intention provisions thereof. While there is California authority that the City's police power does not include the power to legislate solely on aesthetic

grounds (*Varney and Green* v. *Williams, supra; City of Santa Barbara* v. *Modern Neon Sign Company* [1961], 189 Cal.App.2d 188, 197), aesthetics should be considered as a factor, together with other factors, in support of an ordinance. *Carlin* v. *City of Palm Springs, supra.* This view is shared in other jurisdictions. See, e.g., *Wolverine Sign Works* v. *City of Bloomfield Hills* (1937), 279 Michigan 205. The Court in *Desert Outdoor Advertising, Inc.* v. *County of San Bernardino* (1967), 255 Cal.App.2d 765, pointed out that the holdings of recent cases in California, despite *Varney and Green,* are that there are other justifications, such as an economic advantage to the area, which can sustain an ordinance enacted principally for aesthetic considerations. Moreover, the United States Supreme Court in *Berman* v. *Parker,* 348 U.S. 26 (1954), held that the concept of the public welfare is broad and inclusive, and that the values it represents are spiritual as well as physical, aesthetic as well as monetary, and that it is within the power of the legislature to determine that the community should be beautiful as well as healthy. This Court also has given due weight to the proposition set forth in *Cromwell* v. *Ferrier* (1967), 19 N.Y.2d 263, as follows:

> "The Constitution, it is true, does not change with the times, nor does an emergency or unusual circumstance warrant a disregard of constitutional provisions. A determination of what is due process, aside from procedural matters, however, depends upon the reasonableness of the legislation. Circumstances, surrounding conditions, changed social attitudes, newly-acquired knowledge, do not alter the Constitution, but they do alter our view of what is reasonable. Restrictions

upon the use of property, which were deemed unreasonable in 1909, are regarded today as entirely reasonable and natural.

"Once it be conceded that aesthetics is a valid subject of legislative concern, the conclusion seems inescapable that the reasonable legislation designed to promote that end is a valid and permissible exercise of the police power.

"Realistically, the primary objective of any anti-billboard ordinance is an aesthetic one (*Dukeminier, Zoning for Aesthetic Objectives: A Reappraisal,* 20 Law and Contemp. Prob. 218, 220)."

That Court further held that legislation must still be voided if it constitutes an unreasonable device of implementing community policy, and that the exercise of the police power should not extend to every artistic conformity or nonconformity. Rather, what is involved are those aesthetic considerations which bear substantially on economic, social and cultural patterns of community or district; that advertising signs and billboards, if misplaced, often are egregious examples of ugliness, distraction and deterioration; that they are also as subject to reasonable controls, including prohibition, as enterprises which omit offensive noises, odors or debris; that the eye is entitled to as much recognition as the other senses, but, of course, the offense to the eye must be substantial, and be deemed to have material effect on the community or district pattern. Finally, the California Supreme Court has indicated that an ordinance prohibiting advertising signs adjacent to freeways was for the purpose of enhancing community aesthetic values as well as highway safety. See *City of San Diego* v. *Desert*

Appendix D—Memorandum of Intended Ruling of the Superior Court

Outdoor Advertising, Inc. (1973), 8 Cal.3d 785, 790. This Court recognizes that the common use of rail transportation is virtually non-existent, and that it is a well-known fact that people generally have recourse to the automobile as the common means of transportation (*Gwazner Corp.* v. *Minier* [1975], 46 Cal.App.3d 777) and therefore that the hazards purpose of the ordinance is a valid exercise of police power.

This Court thus concludes that the ordinance was not enacted solely for aesthetic purposes and hence cannot be found to be an improper exercise of the police power on that ground.

In determining whether the City has otherwise properly exercised its police power, this Court is not unmindful of the well-recognized principle that courts are loathe to substitute their judgment as to the necessity for a particular enactment for the legislative judgment as to the need of such enactment, and that a large discretion is vested in the legislative branch of the government with reference to the exercise of the police power. The Court also has in mind that in virtually all cases which have discussed regulations totally abolishing billboards, the regulations were held to be invalid exercises of the police power, and that California courts have held the question of reasonableness is to be determined largely by balancing public gains against private losses. See, e.g., *National Outdoor Advertising Company* v. *County of Monterey, supra.* See also *City of Los Angeles* v. *Gage, supra,* which held that constitutionality depends on the relative importance to be given to the public gain and to the private loss.

This Court is also aware that it is neither a super board of adjustment nor a planning commission of last resort, but

acts as a judicial overseer, drawing the limits beyond which local regulation may not go, but loathing to interfere, within those limits, with the discretion of local governing bodies. Further, that the zoning power is one of the tools of government which, in order to be effective, must not be subjected to judicial interference unless clearly necessary.

The ordinance in question does not declare offsite signs to be a nuisance, hence distinguishing it from most ordinances declaring advertising adjacent to its freeways to be a nuisance, such as *City of Escondido* v. *Desert Outdoor Advertising, Inc.,* 8 Cal.3d 785. Even if such a declaration were contained in the ordinance, it would be subject to the constitutional protection against unreasonable or arbitrary action on the part of the City. *People Ex Rel. Department of Public Works* v. *Adco Advertising, supra.* Moreover, the ordinance in question is cast in the form of a penal statute subjecting violators to a fine and imprisonment. Additionally, the business of the plaintiffs has been declared to be a legitimate, commercial use of property adjacent to roads and highways and to be an integral part of the business and marketing function as well as an established segment of the national economy. The legislature has further declared that it should be allowed to exist in business areas, subject to reasonable control in the public interest. (Section 552 California Business & Professions Code.)

The total use prohibition of the ordinance in question should not be permitted to exist without clearly substantiated proof of its relationship to the governmental police power, nor unless the total unavailability of freedom of speech is no greater than is essential to the furtherance of an important or substantial governmental interest. While

the purposes and intents of the ordinance appear salutory, the aforementioned involvement of freedom of speech, together with the facts of the clear and demonstrated adverse effects caused to plaintiffs, compel the Court to conclude that the private and public losses clearly outweigh the public gains.

The end, however attractive it may appear, does not justify unconstitutional means. Accordingly, the Court grants the plaintiffs' motions for summary judgment, and finds that the ordinance in question is invalid and unconstitutional and that the permanent injunction prayed for should issue.

Dated: May 27, 1975

JACK R. LEVITT
Judge of the Superior Court

APPENDIX E

Order of the Superior Court

OPINION BY JUDGE JACK R. LEVITT

June 27, 1975

No. 332881

METROMEDIA, INC., a corporation, doing business as FOSTER AND KLEISER,

Plaintiff,

vs.

CITY OF SAN DIEGO, a municipal corporation, and DOES I through XX, inclusive,

Defendants.

No. 333292

(Consolidated)

PACIFIC OUTDOOR ADVERTISING CO., INC., an Arizona corporation,

Plaintiff,

vs.

THE CITY OF SAN DIEGO, a municipal corporation, THE CITY COUNCIL OF SAN DIEGO, VOYD BEIGHTS, Zoning Administrator of the City of San Diego and DOES 1 through 10, inclusive,

Defendants.

The motions of plaintiffs Metromedia, Inc. and Pacific Outdoor Advertising Company, Inc. for summary judgment

in these consolidated actions and the motions of defendant City of San Diego for summary judgment came on regularly for hearing in Department 11 of the above-entitled Court before the Honorable Jack R. Levitt, Judge of the Superior Court of the State of California for the County of San Diego on February 28, 1975. Gibson, Dunn & Crutcher by Theodore B. Olson and Hillyer & Irwin by Oscar F. Irwin appeared as counsel for plaintiff Metromedia, Inc. Snell & Wilmer by John J. Bouma and Guy G. Gelbron and Higgs, Fletcher & Mack by Joe N. Turner appeared as counsel for plaintiff Pacific Outdoor Advertising Co., Inc. John W. Witt, City Attorney by C. Alan Sumption, Deputy City Attorney, appeared as counsel for defendants. The matter was argued and submitted.

The Court having fully examined the pleadings on file herein, the Joint Stipulation of Facts, the declarations filed relative to the various motions, the interrogatory answers, deposition testimony and responses to requests for admissions cited in support and in opposition to the various motions and the exhibits to such material and having read the points and authorities filed with respect to such motions, having heard oral argument with respect to said motions and after taking judicial notice of matters judicially noticed, and being fully advised in the premises and good cause of affirming therefor:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the motions of the plaintiffs for summary judgment on the grounds that there are no defenses to the actions of the plaintiffs, no triable issues of any material fact relative thereto, and that the moving parties are entitled to judgment as a matter of law, be and they are hereby granted; and judgment shall be entered in favor of plaintiffs.

Appendix E—Order of the Superior Court

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that the motions of defendants be and they hereby are denied.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that Ordinance No. 10795 (N.S.) of the City of San Diego, except Sections 101.0701 and 101.0702 thereof, is unconstitutional, null and void.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that defendants, their agents, servants, employees and representatives and all persons acting in concert or participating therewith shall be and they hereby are enjoined and restrained from engaging in, committing or performing, or causing to be done, directly or indirectly, any or all of the following acts:

> Taking any steps or proceeding in any manner to enforce the provisions of Ordinance No. 10795 (N.S.) of the City of San Diego, except sections 101.0701 and 101.0702 thereof, to prevent or prohibit the erection, operation, maintenance, or customary use by the plaintiffs, and each of them, of any and all outdoor advertising displays now or hereafter owned by plaintiffs, or each of them, in the City of San Diego, or taking any steps or proceeding in any manner whatsoever to compel or require the removal thereunder of any such display now owned by plaintiffs or each of them, in the City of San Diego, or otherwise to take any steps or to proceed in any manner to enforce the provisions of said ordinance.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all bonds filed by plaintiffs in connection with the issuance of

temporary restraining orders and preliminary injunctions be and they hereby are exonerated.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff Metromedia, Inc. shall have and recover from defendant City of San Diego their costs and disbursements in the sum of $ ..... and that plaintiff Pacific Outdoor Advertising Co., Inc. shall have and recover from defendants The City of San Diego, The City Council of San Diego, and Voyd Beights, Zoning Administrator of the City of San Diego, and each of them, their costs and disbursements in the sum of $.....

Dated: June 27, 1975

JACK R. LEVITT
Judge of the Superior Court

APPENDIX F

Notice of Appeal

L.A. Number 30782 San Diego County Superior Court Nos. 332881 and 333292

IN THE

SUPREME COURT
OF THE STATE OF CALIFORNIA

METROMEDIA, INC., a corporation dba FOSTER AND KLEISER,

Plaintiff and Appellant,

VS.

CITY OF SAN DIEGO, a municipal corporation, and DOES I through XX, inclusive,

Defendants and Appellees.

PACIFIC OUTDOOR ADVERTISING CO., INC., an Arizona corporation,

Plaintiff and Appellant,

VS.

THE CITY OF SAN DIEGO, a municipal corporation, THE CITY COUNCIL OF SAN DIEGO, VOYD BEIGHTS, Zoning Administrator of the City of San Diego, and DOES I through X, inclusive,

Defendants and Appellees.

TO THE HONORABLE ROSE E. BIRD, CHIEF JUSTICE OF CALIFORNIA AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Appendix F—Notice of Appeal

NOTICE IS HEREBY GIVEN that plaintiffs Metromedia, Inc. and Pacific Outdoor Advertising Co., Inc. hereby appeal to the United States Supreme Court, from so much of the final judgment of the Supreme Court of the State of California in the within action which is reflected in the Opinion of said Court issued on April 14, 1980, as modified on denial of rehearing on May 14, 1980, which upheld, as against challenges under the Constitution of the United States, the constitutionality of San Diego Ordinance No. 10795 (New Series).

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: July 23, 1980

GIBSON DUNN & CRUTCHER
THEODORE B. OLSON
WAYNE W. SMITH
515 South Flower Street
Los Angeles, California 90071

By /s/ THEODORE B. OLSON
Theodore B. Olson

Attorneys for Plaintiff
Metromedia, Inc.

CAHILL GORDON & REINDEL
FLOYD ABRAMS
80 Pine Street
New York, New York 10005

By /s/ FLOYD ABRAMS by DB
Floyd Abrams

Attorneys for Plaintiff
Outdoor Advertising Co., Inc.

APPENDIX G

Constitutional and Statutory Provisions

The First Amendment to the United States Constitution provides, in part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

The Fourteenth Amendment of the United States Constitution provides, in part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

ORDINANCE NO. 10795

(New Series)

AN ORDINANCE AMENDING CHAPTER IX, ARTICLE 5, OF THE SAN DIEGO MUNICIPAL CODE, BY REPEALING SECTIONS 95.0103.11, 95.0103.12, 95.0301, 95.0302, 95.0302.5, 95.0302.6, 95.0303, 95.0304, 95.0305, 95.0306, 95.0307, 95.0308, 95.0309, 95.0321, 95.0322, 95.0323, 95.0324, 95.0325, 95.0326 AND 95.0327, AND AMENDING CHAPTER X, ARTICLE 1, OF THE SAN DIEGO MUNICIPAL CODE BY AMENDING THE TITLE OF DIVISION 7 AND ADDING SECTIONS 101.0700, 101.0701 AND 101.0702, RELATING TO GENERAL SIGN REGULATIONS.

BE IT ORDAINED, by the Council of The City of San Diego, as follows:

Section 1. That Chapter IX, Article 5, of the San Diego Municipal Code be amended by repealing the following sections:

SEC. 95.0103.11 SIGN CONTROL DISTRICT (LA JOLLA AREA)

SEC. 95.0103.12 SIGN CONTROL DISTRICT—RANCHO BERNARDO

SEC. 95.0301 PURPOSE

SEC. 95.0302 DEFINITIONS

SEC. 95.0302.5 OUTDOOR ADVERTISING DISPLAY SIGN—DEFINED

SEC. 95.0302.6 SIGN—DEFINED

SEC. 95.0303 PROHIBITED SIGNS

SEC. 95.0304 REMOVAL REQUIRED

SEC. 95.0305 EXEMPT OUTDOOR ADVERTISING DISPLAY SIGNS

SEC. 95.0306 CONSTRUCTION STANDARDS

SEC. 95.0307 PERMITS

SEC. 95.0308 DISPLAY SIGNS—BOARD OF ZONING APPEALS

SEC. 95.0309 ENFORCEMENT

SEC. 95.0321 U.S. HIGHWAY 80—REGULATED

SEC. 95.0322 U.S. HIGHWAY 395—REGULATED

SEC. 95.0323 FEDERAL AID INTERSTATE (5) —REGULATED

SEC. 95.0324 SOLEDAD FREEWAY—REGULATED

SEC. 95.0325 STATE HIGHWAY 94—REGULATED

SEC. 95.0326 INTERSTATE 805—REGULATED

SEC. 95.0327 STATE HIGHWAY 109—REGULATED

Section 2. That Chapter X, Article 1, of the San Diego Municipal Code be amended by changing the Title of Division 7 and adding Sections 101.0700, 101.0701 and 101.0702 to read as follows:

DIVISION 7

GENERAL SIGN REGULATIONS

SEC. 101.0700 PROHIBITION AND ABATEMENT OF OUTDOOR ADVERTISING DISPLAY SIGNS

A. Purpose and Intent

It is the purpose of these regulations to eliminate excessive and confusing sign displays which do not relate to the premises on which they are located; to eliminate hazards to pedestrians and motorists brought about by distracting sign displays; to ensure that signing is used as identification and not as advertisement; and to preserve and improve the appearance of the City as a place in which to live and work.

It is the intent of these regulations to protect an important aspect of the economic base of the City by preventing the destruction of the natural beauty and environment of the City, which is instrumental in attracting nonresidents who come to visit, trade, vacation or attend conventions;

to safeguard and enhance property values; to protect public and private investment in buildings and open spaces; and to protect the public health, safety and general welfare.

B. Off-Premise Outdoor Advertising Display Signs Prohibited

Only those outdoor advertising display signs, hereinafter referred to as signs in this Division, which are either signs designating the name of the owner or occupant of the premises upon which such signs are placed, or identifying such premises; or signs advertising goods manufactured or produced or services rendered on the premises upon which such signs are placed shall be permitted. The following signs shall be prohibited:

1. Any sign identifying a use, facility or service which is not located on the premises.
2. Any sign identifying a product which is not produced, sold or manufactured on the premises.
3. Any sign which advertises or otherwise directs attention to a product, service or activity, event, person, institution or business which may or may not be identified by a brand name and which occurs or is generally conducted, sold, manufactured, produced or offered elsewhere than on the premises where such sign is located.

C. Abatement of Nonconforming Signs

Any sign which is nonconforming in that it does not conform to the regulations embodied in this Division shall either be removed or brought into compliance with the

Code requirements within the period of time prescribed herein dating from the effective date of these regulations.

D. Abatement Schedule

All nonconforming signs shall be removed or brought into compliance with the Code requirements in accordance with the abatement schedule set forth below. In order to utilize the abatement schedule, the owner of record, or his agent, shall make available the market value, as of April 1, 1972, of any sign or signs which have been deemed nonconforming by the provisions of these regulations. The market value of nonconforming signs shall be based on the original cost, including cost of installation, of said sign less ten percent of the original cost per year for each year said sign has been standing prior to the effective date of these regulations.

The date of erection of any nonconforming sign shall be established by the presentation by the owner of record of the sign, or his agent, of a certified copy of the corresponding building permit on file in the Department of Building Inspection of the City of San Diego. Any sign erected without the issuance of a valid building permit shall be deemed an illegal sign and shall be removed immediately.

All required documentation concerning the market value and erection date of any nonconforming sign shall be presented to the Zoning Administrator within ten days of reception of notice of nonconformance. The Zoning Administrator shall determine to his satisfaction the validity of all presented documentation. Any decision of the Zoning Administrator may be appealed in accordance with Sections 101.0504 and 101.0505 of this Code.

Appendix G—Constitutional and Statutory Provisions

ABATEMENT SCHEDULE

Adjusted Market Value	*Abatement Date*
Less than $500.00	April 1, 1973
$ 500.00 to 999.99	July 1, 1973
1,000.00 to 1,499.99	October 1, 1973
1,500.00 to 1,999.99	January 1, 1974
2,000.00 to 2,999.99	April 1, 1974
3,000.00 to 3,999.99	July 1, 1974
4,000.00 to 4,999.99	October 1, 1974
5,000.00 to 7,499.99	January 1, 1975
7,500.00 to 9,999.99	April 1, 1975
10,000.00 to 12,499.99	July 1, 1975
12,500.00 to 14,999.99	October 1, 1975
15,000.00 to 19,999.99	January 1, 1976
20,000.00 and over	April 1, 1976

Notwithstanding any other provisions of this Code, all outdoor advertising display signs which are not signs designating the name of the owner or occupant of the premise upon which such signs are placed or which do not identify such premises or which do not advertise goods manufactured or produced or services rendered on the property upon which such signs are placed and which are signs designed to be viewed from any portion of a freeway, landscaped freeway, scenic highway or freeway, or parkway as defined in Sections 95.0302.1, 95.0302.2, 95.0302.3 and 95.0302.4 of this Code and are located within 500 feet from the boundary line of said freeway, landscaped freeway, scenic highway or freeway, or parkway shall be abated within 90 days of the effective date of these regulations. Any such sign not abated within 90 days of the effective date of these regulations shall be subject to all of the provisions of Section 101.0700, paragraph E.

E. Removal of Nonconforming Signs

Any sign that is in noncompliance with the regulations of this Code as defined in Section 101.0700 shall be removed prior to or upon the date designated for removal in the above abatement schedule. If the owner of, or the person or persons responsible for, the sign fails to remove the nonconforming sign, the owner of the premises upon which the sign is located shall be responsible for the removal of the sign and the work shall be done within 90 days following the date of nonconformance. The procedure for the removal of all nonconforming signs shall be as follows:

1. The Zoning Administrator, after proper notification, may cause the removal of any nonconforming sign and shall, at his discretion, charge the costs incurred against any of the following, each of whom shall be jointly and severally liable for said charges; provided, however, that any decision or determination of the Zoning Administrator may be appealed in accordance with Sections 101.0504 and 101.0505 of this Code.

   a. The permittee.

   b. The owner of the sign.

   c. The owner of the premises on which the sign is located.

   d. The occupant of the premises on which the sign is located.

2. A sign removed by the City shall be held not less than 30 days by the City during which time it may be recovered by the owner upon payment to the City for costs of removal and storage. If not recovered prior to expiration of the 30-day period, the sign and sup-

porting structures shall be declared abandoned and title thereto shall vest in the City and the cost of removal shall be billed to the owner.

F. Signs Exempt From These Regulations

The following types of signs shall be exempt from the provisions of these regulations:

1. Any sign erected and maintained pursuant to and in discharge of any governmental function or required by any law, ordinance or governmental regulation.
2. Bench signs located at designated public transit bus stops; provided, however, that such signs shall have any necessary permits required by Sections 62.0501 and 62.0502 of this Code.
3. Signs being manufactured, transported and/or stored within the City limits of the City of San Diego shall be exempt; provided, however, that such signs are not used, in any manner or form, for purposes of advertising at the place or places of manufacture or storage.
4. Commemorative plaques of recognized historical societies and organizations.
5. Religious symbols, legal holiday decorations and identification emblems of religious orders or historical societies.
6. Signs located within malls, courts, arcades, porches, patios and similar areas where such signs are not visible from any point on the boundary of the premises.

7. Signs designating the premises for sale, rent or lease; provided, however, that any such sign shall conform to all regulations of the particular zone in which it is located.
8. Public service signs limited to the depiction of time, temperature or news; provided, however, that any such sign shall conform to all regulations of the particular zone in which it is located.
9. Signs on vehicles regulated by the City that provide public transportation including, but not limited to, buses and taxicabs.
10. Signs on licensed commercial vehicles, including trailers; provided, however, that such vehicles shall not be utilized as parked or stationary outdoor display signs.
11. Temporary off-premise subdivision directional signs if permitted by a conditional use permit granted by the Zoning Administrator.
12. Temporary political campaign signs, including their supporting structures, which are erected or maintained for no longer than 90 days and which are removed within 10 days after election to which they pertain.

G. Conflict With Other Regulations of This Code

Where there is a conflict between the regulations of Section 101.0700 and the regulations of any other section of this Code, the regulations of Section 101.0700 shall prevail; provided, however, that the regulations of other sections shall prevail in the following cases:

1. Where the regulations of any other section are more restrictive.
2. Where a sign control district has been established by ordinance, provided that the assigned regulations of said district are comprehensive and provide sign regulations for all zones located within said district.
3. Where a planned district has been established in accordance with the procedure set forth in Section 103.0101 of this Code, provided that any such planned district regulations shall include comprehensive sign regulations encompassing the entire planned district area.
4. Where an architectural control district has been established by ordinance, provided that any such architectural control district regulations shall include comprehensive sign regulations encompassing the entire architectural control district area.

H. Compliance With Chapter IX of This Code

Nothing in the regulations of Section 101.0700 shall relieve any party from the requirements to obtain any or all permits required by Chapter IX of this Code.

SEC. 101.0701 SIGN CONTROL DISTRICT—LA JOLLA

A. Purpose and Intent

The Sign Control District is intended to maintain the unique, distinctive character and economic value of the La Jolla area in the City of San Diego and to regulate advertising of commercial enterprises in the R-1 and R-2 Zones within the boundaries of the Sign Control District.

B. Boundaries

The boundaries of the La Jolla Sign Control District are designated on that certain map No. C-267 and described in the appended boundary description filed in the office of the City Clerk under Document No. 709551.

C. Sign Defined

For the purposes of this section the word sign is hereby defined to mean any fabricated sign including its structure, consisting of any letter, figure, character, mark, paint, plane, marquee, sign, design poster, pictorial picture, stroke, strip, line, trademark, reading matter or illuminating device constructed, attached, erected, fastened, or manufactured in any manner whatsoever so that the same shall be used for the attraction of the public to any place, subject, person, firm, corporation, public performance, article, machine, or merchandise whatsoever and displayed in any manner whatsoever in or out of doors for recognized advertising purposes, and shall also include any such sign carrying the following words, or words of similar import: "for rent," "for sale" or "for lease."

D. Signs Regulated

1. Except as otherwise provided herein, it shall be unlawful for any person to erect or cause to be placed or maintained any sign or signs upon real property in the R-1 or R-2 Zones within the Sign Control District.

2. One sign shall be permitted on each lot or parcel of real estate, to advertise the leasing, rental or sale of such lot or parcel, provided that such sign meets all of the following conditions:

a. Such sign shall be installed and maintained by, or at the direction of, the owner of such lot or parcel of real property.

b. Such sign shall not exceed 5″ x 8″ in size and no part of such sign shall extend more than four feet above the surface of the ground upon which it is erected.

c. Such sign shall be erected and maintained substantially parallel to the street which such lot or parcel faces.

d. Such sign shall be unlighted.

3. Signs for real estate sales offices, demonstration, or model dwelling units, and name plates, shall be permitted subject to the conditions provided in the Municipal Code for R-1 and R-2 Zones.

4. In the R-2 Zone, church signs shall be permitted pursuant to the provisions of the R-2 Zone.

E. Existing Controls

The requirements of this section shall be in addition and supplementary to all other existing sign controls now in effect for R-1 and R-2 Zones under the provisions of the Code, and shall prevail in the event of any conflict.

SEC. 101.0702 SIGN CONTROL DISTRICT—RANCHO BERNARDO

A. Purpose and Intent

The Sign Control District is intended to maintain the unique, distinctive character and economic value of the Rancho Bernardo area in the City of San Diego and to

regulate advertising of commercial enterprises in the R-1, R-2, A-1-1, A-1-5 and A-1-10 Zones within the boundaries of the Sign Control District.

B. Boundaries

The boundaries of the Rancho Bernardo Sign Control District are designated on that certain map No. C-280 and described in the appended boundary description filed in the office of the City Clerk under Document No. 729898.

C. Signs Defined

For the purposes of this section, the word "sign" is hereby defined to mean any fabricated sign including its structure, consisting of any letter, figure, character, mark, paint, plane, marquee, sign, design, poster, pictorial picture, stroke, strip, line, trademark, reading matter or illuminating device constructed, attached, erected, fastened, or manufactured in any manner whatsoever so that the same shall be used for the attraction of the public to any place, subject, person, firm, corporation, public performance, article, machine, or merchandise whatsoever and displayed in any manner whatsoever in or out of doors for recognized advertising purposes, and shall also include any such sign carrying the following words, or words of similar import: "for rent," "for sale" or "for lease."

D. Signs Regulated

1. Except as otherwise provided herein, it shall be unlawful for any person to erect or cause to be placed or maintained any sign or signs upon real property in the R-1, R-2, A-1-1, A-1-5 or A-1-10 Zones within this Sign Control District.

2. One sign shall be permitted on each lot or parcel of real estate, to advertise the leasing, rental or sale of such lot or parcel, provided that such sign meets all of the following conditions:

   a. Such sign shall be installed and maintained by, or at the direction of, the owner of such lot or parcel of real property.

   b. Such sign shall be erected and maintained substantially parallel to the street which such lot or parcel faces.

   c. Such sign shall not exceed 9″ x 12″ in size and no part of such sign shall extend more than four feet above the surface of the ground upon which it is erected.

   d. Such sign shall be unlighted.

3. Signs for real estate sale offices, demonstration, or model dwelling units, and name plates, shall be permitted subject to the conditions provided in the Municipal Code for R-1, R-2, A-1-1, A-1-5 and A-1-10 Zones.

4. In the R-2 Zone, church signs shall be permitted pursuant to the provisions of the R-2 Zone.

E. Existing Controls

The requirements of this section shall be in addition and supplementary to all other existing sign controls now in effect for R-1, R-2, A-1-1, A-1-5 and A-1-10 Zones under the provisions of the Code, and this section shall prevail in the event of any conflict.

Section 3. Severability. If any section, subsection, sentence, clause or phrase of this ordinance is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this ordinance. The City Council hereby declares that it would have passed this ordinance, and each section, subsection, sentence, clause and phrase hereof irrespective of the fact that any one or more of the sections, subsections, sentences, clauses or phrases hereof be declared invalid or unconstitutional.

Section 4. This ordinance shall take effect and be in force on the thirtieth day from and after its passage. No sign permit for any sign shall be issued on or after the effective date of this ordinance unless the sign and the premises conform in every respect to the provisions of this ordinance and other applicable Municipal Code regulations.

Introduced on February 22, 1972.

Passed and adopted by the Council of The City of San Diego on March 14, 1972.

AUTHENTICATED BY:

PETE WILSON,
Mayor of The City of San Diego, California.
EDWARD NIELSEN,
City Clerk of The City of San Diego, California.
By JUDITH A. DILLON, Deputy.

(SEAL)

Published March 23, 1972

APPENDIX H

Joint Stipulation of Facts

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

METROMEDIA, INC., a corporation doing business as FOSTER AND KLEISER,

Plaintiff,

vs.

CITY OF SAN DIEGO, a municipal corporation, and DOES I through XX, inclusive,

Defendants.

PACIFIC OUTDOOR ADVERTISING CO., INC., an Arizona corporation,

Plaintiff,

vs.

THE CITY OF SAN DIEGO, a municipal corporation, THE CITY COUNCIL OF SAN DIEGO, VOYD BEIGHTS, Zoning Administrator of the City of San Diego and DOES 1 through 10, inclusive,

Defendants.

The parties to this litigation are filing cross-motions for summary judgment. This Stipulation of Facts is entered into for the purpose of these motions and for any judgment thereon or appeals therefrom and for no other purpose. The parties agree that the facts specified herein are true for said purposes only and none of the parties hereto shall be bound thereby for any other purposes.

Appendix H—Joint Stipulation of Facts

STIPULATED FACTS

1. On March 14, 1972, the City Council of the City of San Diego adopted Ordinance No. 10795, a true, correct and complete copy of which is attached hereto and incorporated herein by reference as Exhibit A.

2. If enforced as written, Ordinance No. 10795 will eliminate the outdoor advertising business in the City of San Diego.

3. The City of San Diego, with a population of 750,000 people*, is the second most populated city in the State of California, the most populated state in the nation.

4. The City of San Diego is the seat of the county government of the County of San Diego. The County has a population in excess of 1,500,000 persons.*

5. The City of San Diego contains approximately 320 square miles or 204,800 acres.

6. The City of San Diego is multi-faceted, containing beaches, hills, residential areas, parks, a major seaport and naval base, a substantial commercial area, hundreds of miles of streets, highways and freeways, a large industrial area, a major airport and numerous major industries.

7. The citizens of the City of San Diego derive their livelihood from a variety of sources, including retail businesses, heavy industry, commercial centers, tourist services, agriculture, government contracts, wholesale supplies and a variety of services.

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* As of April, 1974.

8. The homes, commercial structures and industrial facilities of the City of San Diego are of all vintages, old and new. Some sections of the City of San Diego are scenic, some blighted, some containing strips of vehicle related commercial uses, some contain new and attractive office buildings, some functional industrial development and some areas contain older but useful commercial establishments.

9. Approximately 13% of the City of San Diego is zoned for residential purposes, 1.4% for commercial uses, 1.4% industrial, 8.5% for streets and highways, 20% for public and semi-public uses and the balance is vacant or used for agricultural purposes.*

10. The City of San Diego General Plan adopted in 1967 indicates its citizens found employment substantially as follows in the year 1962:**

Agriculture	1.6%
Construction	6.6%
Manufacturing	22.4%
Transportation, Communication and Utilities	4.7%
Wholesale Trade	3.2%
Retail Trade	17.5%
Finance, Insurance and Real Estate	4.5%
Services	19.2%
Government	19.7%

* These figures are approximate figures for 1967, the date of the San Diego General Plan. The same general proportions may be considered valid for all other periods relevant to this litigation.

** Certain minor fractions have been omitted from this table. While the fractions specified have undoubtedly fluctuated over the years, such changes would be of such magnitude as not to be material to this motion. Therefore, these figures may be taken as true for all periods relevant to this litigation.

Appendix H—Joint Stipulation of Facts

11. The City of San Diego General Plan of 1967 projected a 1985 population of almost double that of 1967.

12. Both of the plaintiffs are companies legally engaged in the outdoor advertising business in the City of San Diego and the State of California. (Defendant, of course, contends that Ordinance No. 10795 is legal and valid and that plaintiffs are currently in violation of this Ordinance. Accordingly, to this extent, defendant does not admit that plaintiffs are at this time "legally engaged in business in the City of San Diego.")

13. Each of the plaintiffs are the owners of a substantial number of outdoor advertising displays (approximately 500 to 800) in the City of San Diego.

14. Substantially all of the displays owned by plaintiffs are located on property leased by the owners thereof to the plaintiffs for the purposes of maintaining outdoor advertising displays thereon.*

15. Each of the displays were legally erected in full compliance with all applicable municipal and state laws and are in full compliance with such laws except for the contested legality of Ordinance No. 10795.

16. The cost of producing and erecting each display was substantial.

17. The displays have varying values depending upon their size, nature and location.

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* A few may be located on property owned by the plaintiffs.

18. Each of the displays has a fair market value, as a part of an income-producing system, of between $2,500 and $25,000.

19. Each display has a remaining useful income-producing life in excess of 25 years.

20. All of the signs owned by plaintiffs in the City of San Diego are located at areas zoned for commercial and industrial purposes.

21. Outdoor advertising is a means of communication and a media for the expression of ideas.

22. There is a difference between the outdoor advertising business and "on-site" or business signs. On-site signs advertise businesses, goods or services available on the property on which the sign is located. On the other hand, the outdoor advertising businesses lease real property and erect signs thereon which are made available to national and local advertisers for commercial, political and social messages. Outdoor advertising is different from on-site advertising in that:

(a) The outdoor advertising sign seldom advertises goods or services sold or made available on the premises on which the sign is located.

(b) The outdoor advertising sign seldom advertises products or services sold or made available by the owner of the sign.

(c) The outdoor advertising sign is, generally speaking, made available to "all-comers", in a fashion similar to newspaper or broadcasting advertising. It

is a forum for the communication of messages to the public.

(d) The copy of the outdoor advertising sign changes, usually monthly. For example, a particular sign may advertise a local savings and loan association one month, a candidate for mayor the next month, the opening of the San Diego Zoo the third month, a new car the fourth month, and a union grievance the fifth month.

23. Outdoor advertising is available for all forms of advertising messages. For example, it has been used in the City of San Diego to advertise national and local products, goods and services, new products being introduced to the consuming public, to publicize the "City in motion" campaign of the City of San Diego, to communicate messages from candidates for municipal, state and national offices, including candidates for judicial office, to propose marriage, to seek employment, to encourage the use of seat belts, to denounce the United Nations, to seek support for Prisoners of War and Missing in Action, to promote the United Crusade and a variety of other charitable and socially-related endeavors and to provide directions to the traveling public.

24. Outdoor advertising is customarily purchased on the basis of a presentation or campaign requiring multiple exposure. Usually a large number of signs in a variety of locations are utilized to communicate a particular advertiser's message. An advertiser will generally purchase a "showing" which would involve the utilization of a specific number of signs advertising the same message in a variety of locations throughout a metropolitan area. Each separate

sign provides exposure of various portions of the populace and each sign thereby forms an integral part of an interdependent whole. As a result, each sign in addition to producing income in and of itself, lends value to the entire system. Therefore, each sign has a value substantially more as a part of the system than it does separately. The value of each sign as a part of an overall system is not readily susceptible to precise measurement.

25. Outdoor advertising is presented in two basic standardized forms. A "poster panel" is a 12-foot by 24-foot sign on which a pre-printed message is posted, in sheets. A "painted bulletin" is generally a 14-foot by 48-foot sign which contains a hand painted message. The message will remain in one place for a period of time, usually a month, and will then be disassembled and replaced by another message while the first message is moved to another sign. In this way, the same hand painted message will be moved throughout a metropolitan area over a six-month or twelve-month period.

26. Plaintiffs' outdoor advertising displays produce substantial gross annual income.

27. Plaintiffs' outdoor advertising displays produce income to a variety of segments of the national, state and local economy and stimulate the flow of trade and commerce. Land owners and advertising agencies receive income from outdoor advertising.

28. Outdoor advertising increases the sales of products and produces numerous direct and indirect benefits to the public. Valuable commercial, political and social information is communicated to the public through the use of out-

door advertising. Many businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitally expensive.

29. Enforcement of Ordinance No. 10795, in addition to eliminating outdoor advertising within the City of San Diego, will adversely affect plaintiffs' businesses outside the City of San Diego in that many national or state-wide advertisers will be inclined to select other media capable of communicating with a wider segment of the consuming public, including San Diego, rather than selecting outdoor advertising which would be unable to communicate with the citizens of San Diego.

30. Plaintiffs and their predecessors have engaged in outdoor advertising in the City of San Diego for more than 60 years.

31. Many of the plaintiffs' signs are within 660 feet and others are within 500 feet of Interstate or Federal Aid Primary highways and are designed to be viewed therefrom.

32. Enforcement of Ordinance No. 10795 will prevent plaintiffs from engaging in the outdoor advertising business in the City of San Diego and will cause plaintiffs to suffer substantial monetary losses.

33. Plaintiffs have entered into contracts to display messages on their respective signs in the City of San Diego; said contracts extending for various periods of time.

34. "The amortization provisions" of Ordinance No. 10795 have no reasonable relationship to the fair market

value, useful life or income generated by the signs and were not designed to have such a relationship.

Dated: November 21, 1974

GIBSON, DUNN & CRUTCHER
THEODORE B. OLSON
and
HILLYER & IRWIN
OSCAR F. IRWIN

By /s/ THEODORE B. OLSON
Theodore B. Olson
Attorneys for Plaintiff
Metromedia, Inc.

SNELL & WILMER
JOHN J. BOUMA
GUY GELBRON
and
HIGGS, FLETCHER & MACK
JOE N. TURNER

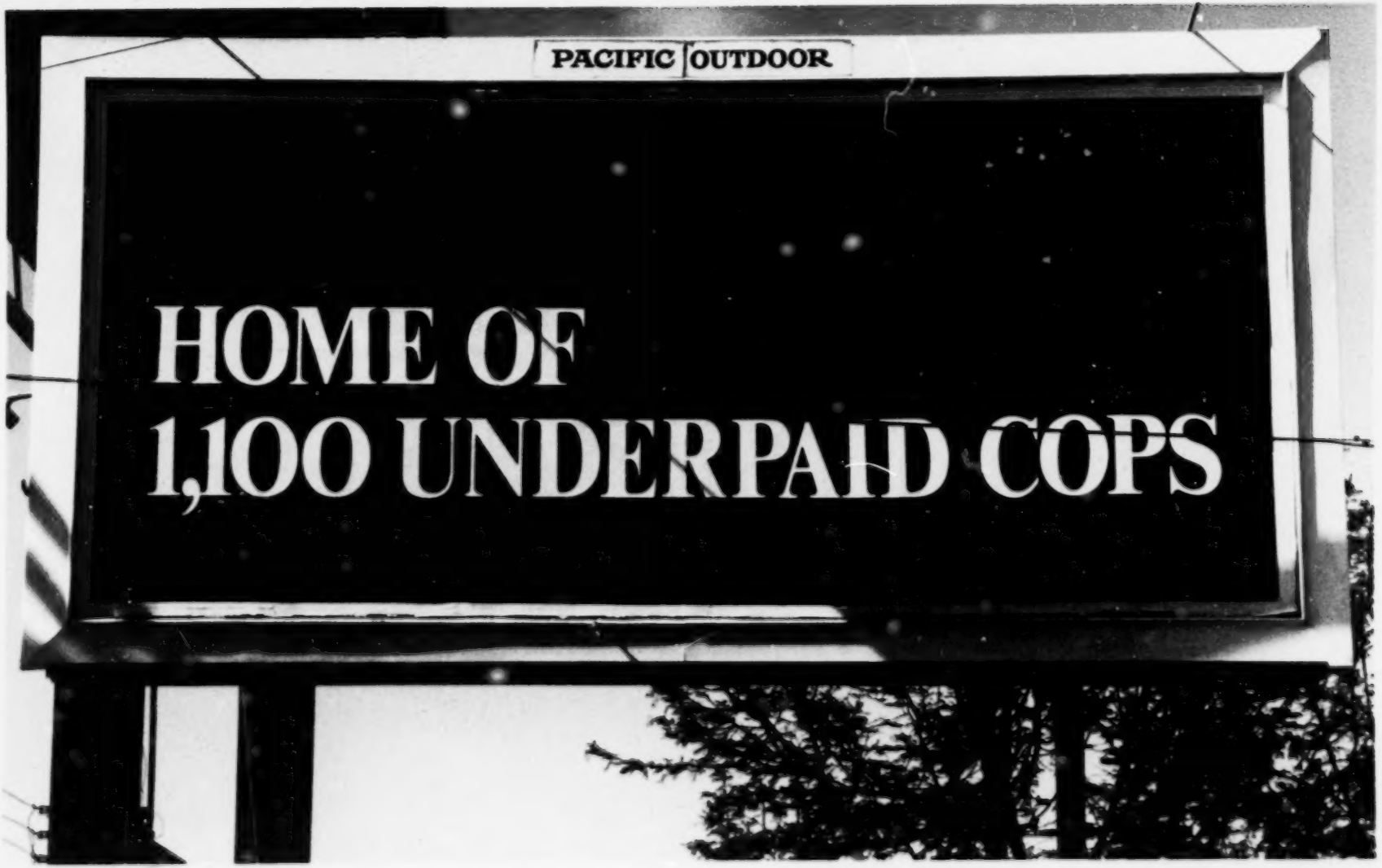
By: /s/ JOHN J. BOUMA
John J. Bouma
Attorneys for Plaintiff
Pacific Outdoor Advertising Co., Inc.

JOHN W. WITT, *City Attorney*
C. ALAN SUMPTION,
Deputy City Attorney

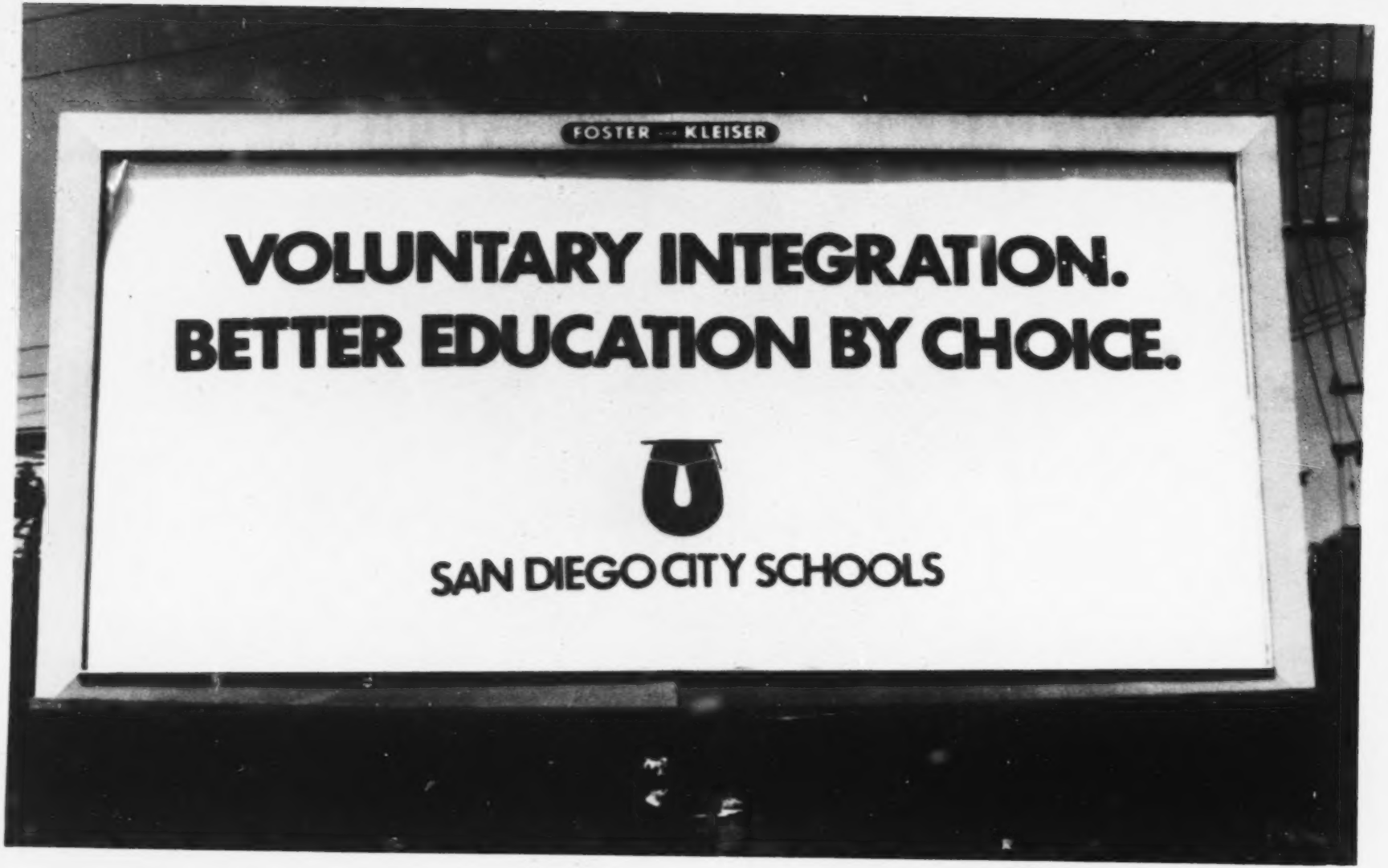
By /s/ C. ALAN SUMPTION
C. Alan Sumption
Attorneys for Defendant
City of San Diego

APPENDIX I

Photographs illustrating political, community service and public interest messages conveyed on outdoor advertising displays in and around San Diego.

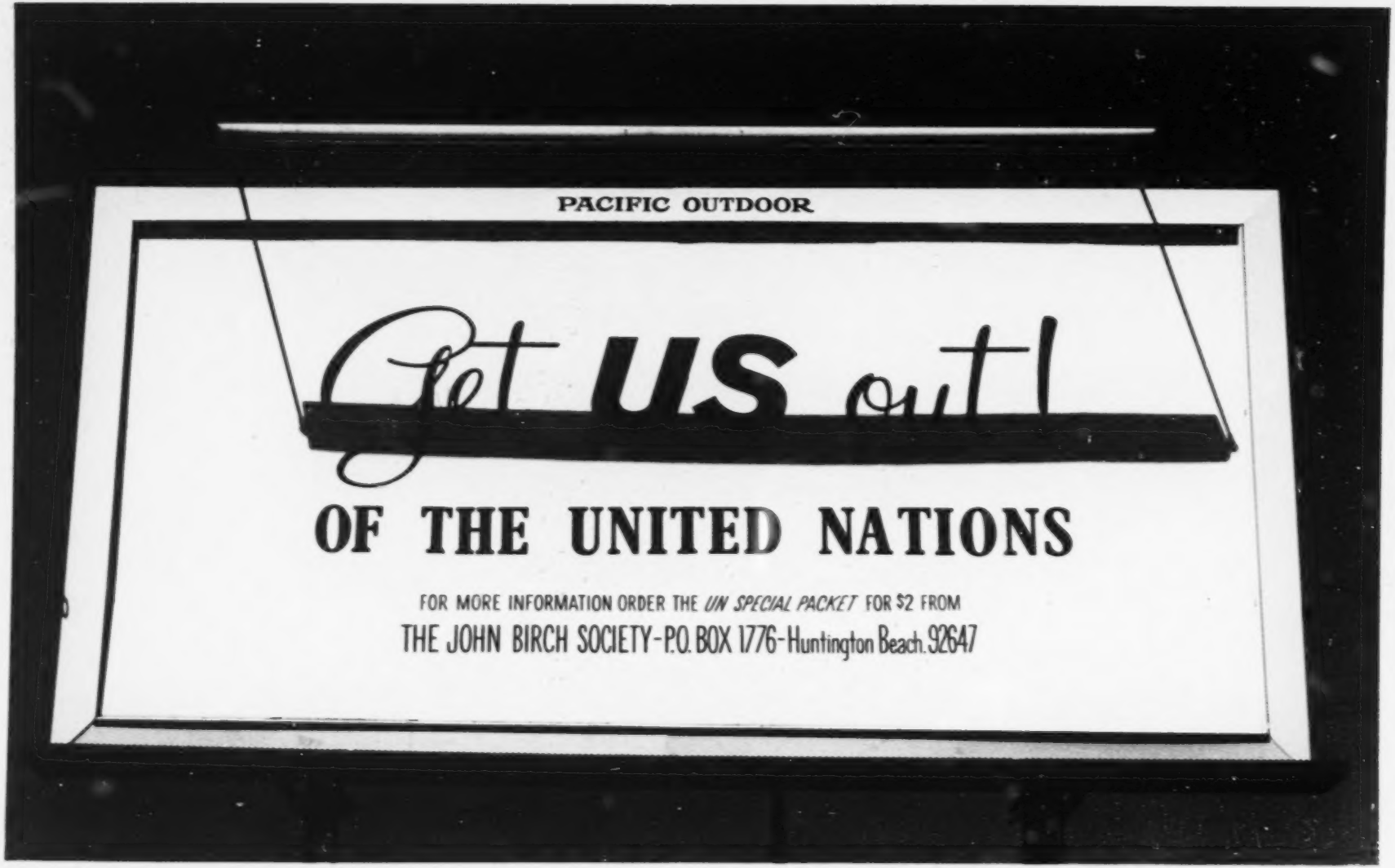

PACIFIC OUTDOOR
HOME OF
1,100 UNDERPAID COPS

FOSTER KLEISER
SUPPORT
SAN DIEGO'S
NO-GROWTH
POLICY
SPEND YOUR MONEY
IN
LOS ANGELES!
BOYCOTT SAN
DIEGO!
S. D. UNFAIR TO FIRE FIGHTERS • Sponsored by SAN DIEGO FIRE FIGHTERS


FOSTER — KLEISER
VOLUNTARY INTEGRATION.
BETTER EDUCATION BY CHOICE.
SAN DIEGO CITY SCHOOLS

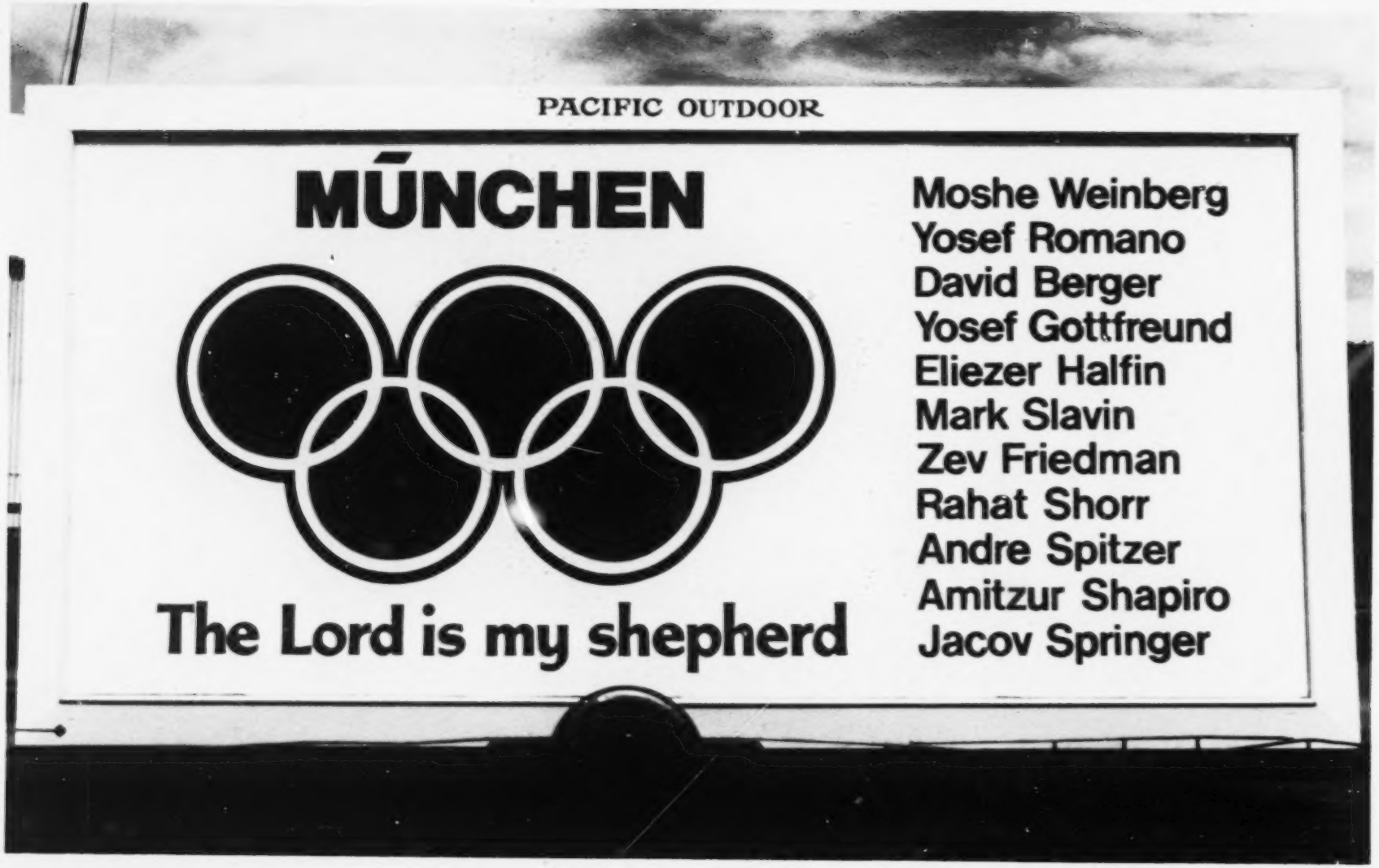
A Public Service of
san diego
county bar
association
call
Lawyer Referral Service
In the Yellow Pages under ATTORNEYS
FOSTER and KLEISER
BEKINS
STORAGE

FOSTER --- KLEISER
SUPPORT
AMERICA'S FIRST
ENVIRONMENT STRIKE
DON'T BUY SHELL!
OIL, CHEMICAL AND ATOMIC WORKERS INT'L. UNION, AFL-CIO


PACIFIC OUTDOOR
Get US out!
OF THE UNITED NATIONS
FOR MORE INFORMATION ORDER THE UN SPECIAL PACKET FOR $2 FROM
THE JOHN BIRCH SOCIETY-P.O. BOX 1776-Huntington Beach. 92647

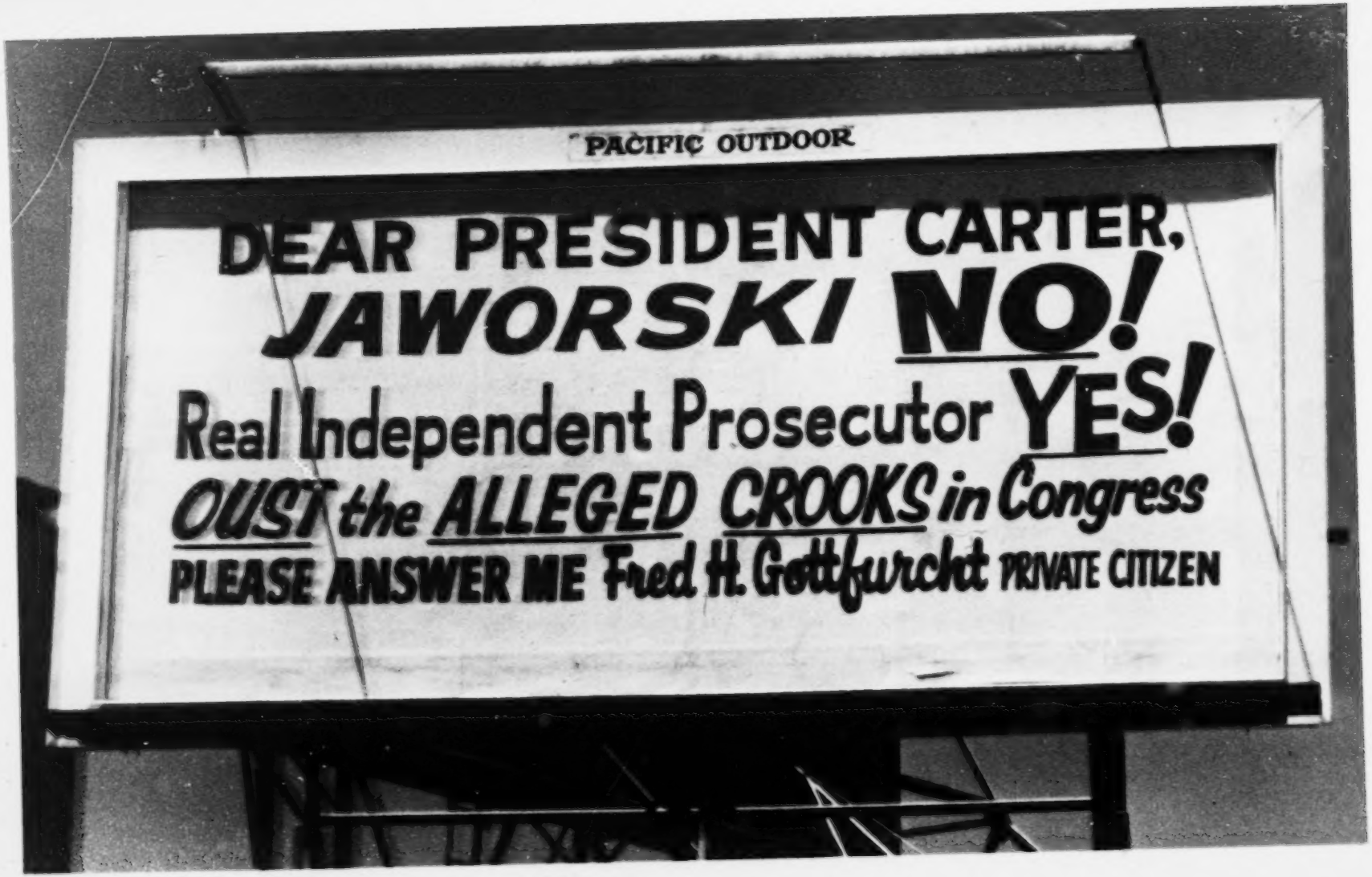
PACIFIC OUTDOOR
GET THEM HOME!
THE PRISONERS OF WAR IN SOUTH EAST ASIA

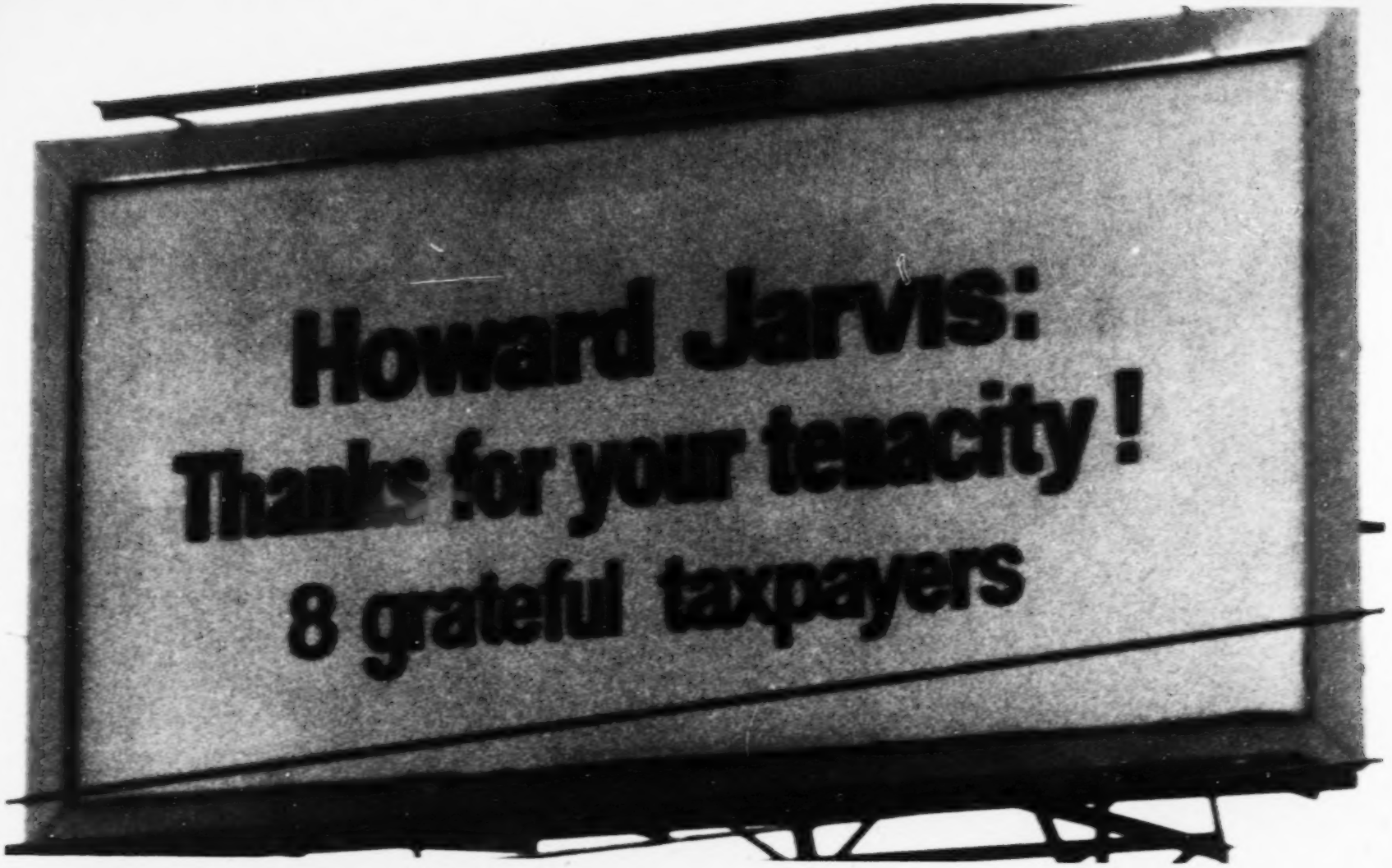
ELLER
THE NUCLEAR ARMS RACE
CAN MAKE THIS
THE LAST GENERATION
Urge Congress to stop it!
WOMEN FOR PEACE 848-3020

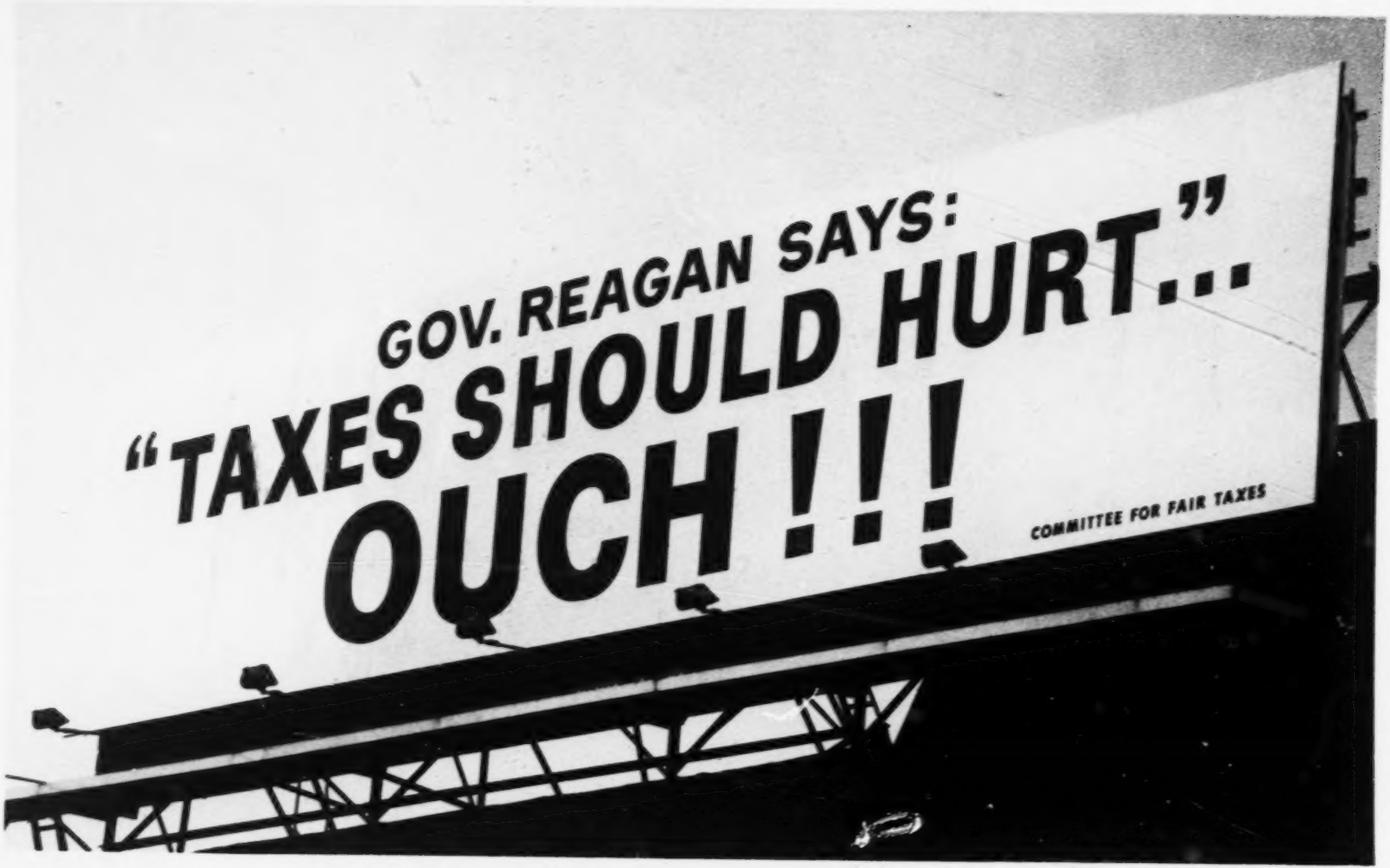

PACIFIC OUTDOOR
MÚNCHEN
The Lord is my shepherd
Moshe Weinberg
Yosef Romano
David Berger
Yosef Gottfreund
Eliezer Halfin
Mark Slavin
Zev Friedman
Rahat Shorr
Andre Spitzer
Amitzur Shapiro
Jacov Springer

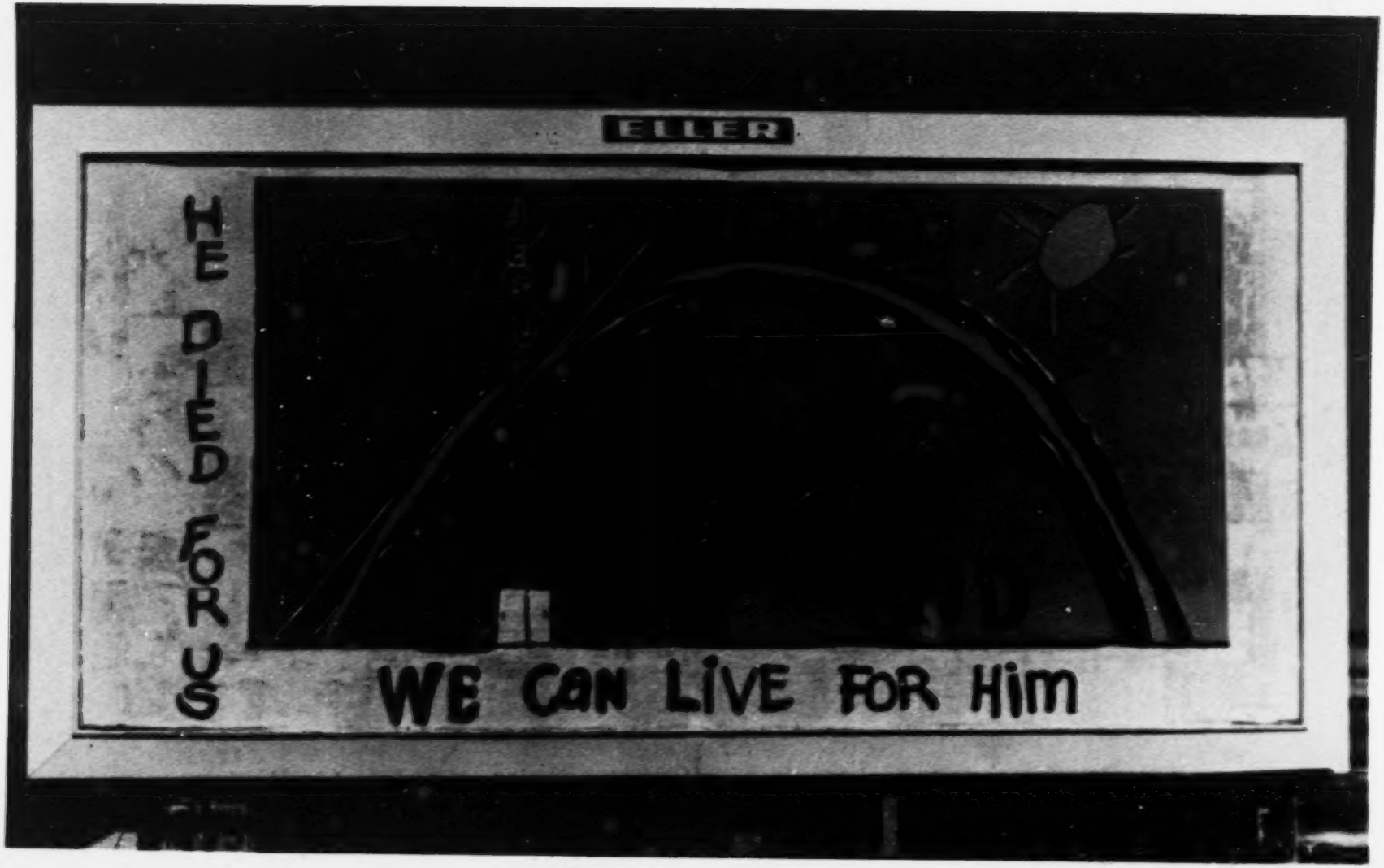
ELLER

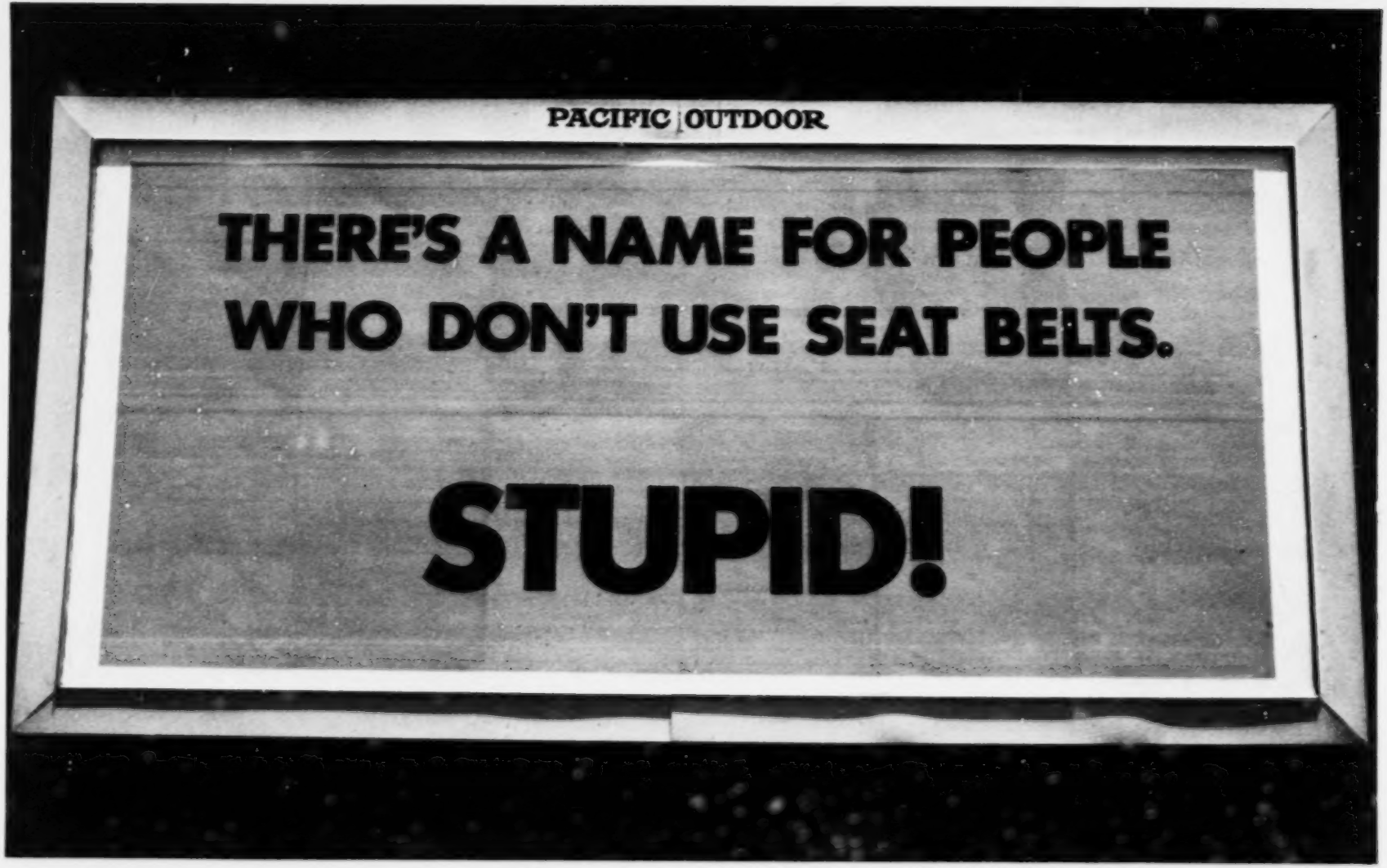
FREEDOM FOR CROATIA


PACIFIC OUTDOOR
DEAR PRESIDENT CARTER,
JAWORSKI NO!
Real Independent Prosecutor YES!
OUST the ALLEGED CROOKS in Congress
PLEASE ANSWER ME Fred H. Gottfurcht PRIVATE CITIZEN

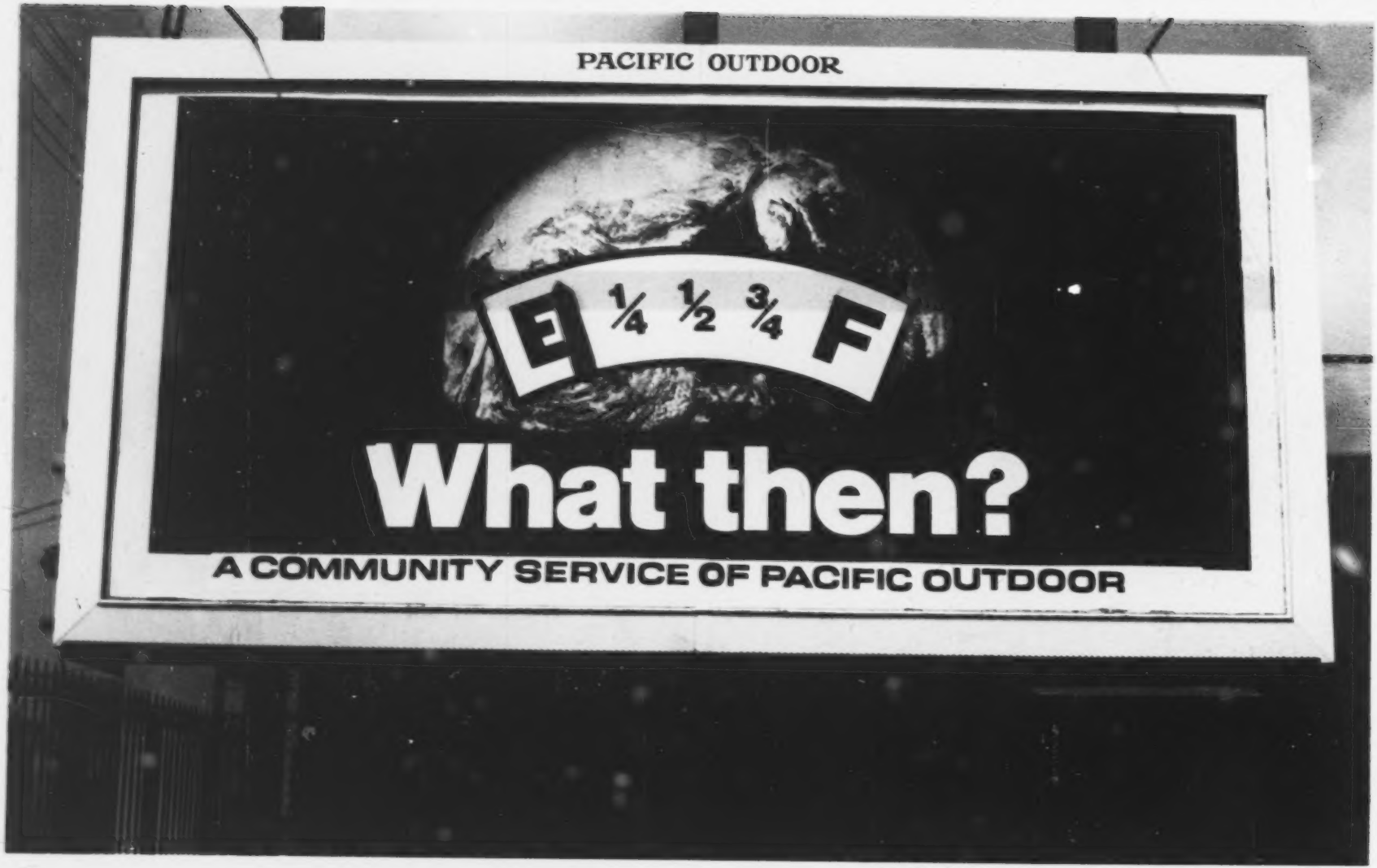

Howard Jarvis:
Thanks for your tenacity!
8 grateful taxpayers


GOV. REAGAN SAYS:
"TAXES SHOULD HURT..."
OUCH!!!
COMMITTEE FOR FAIR TAXES

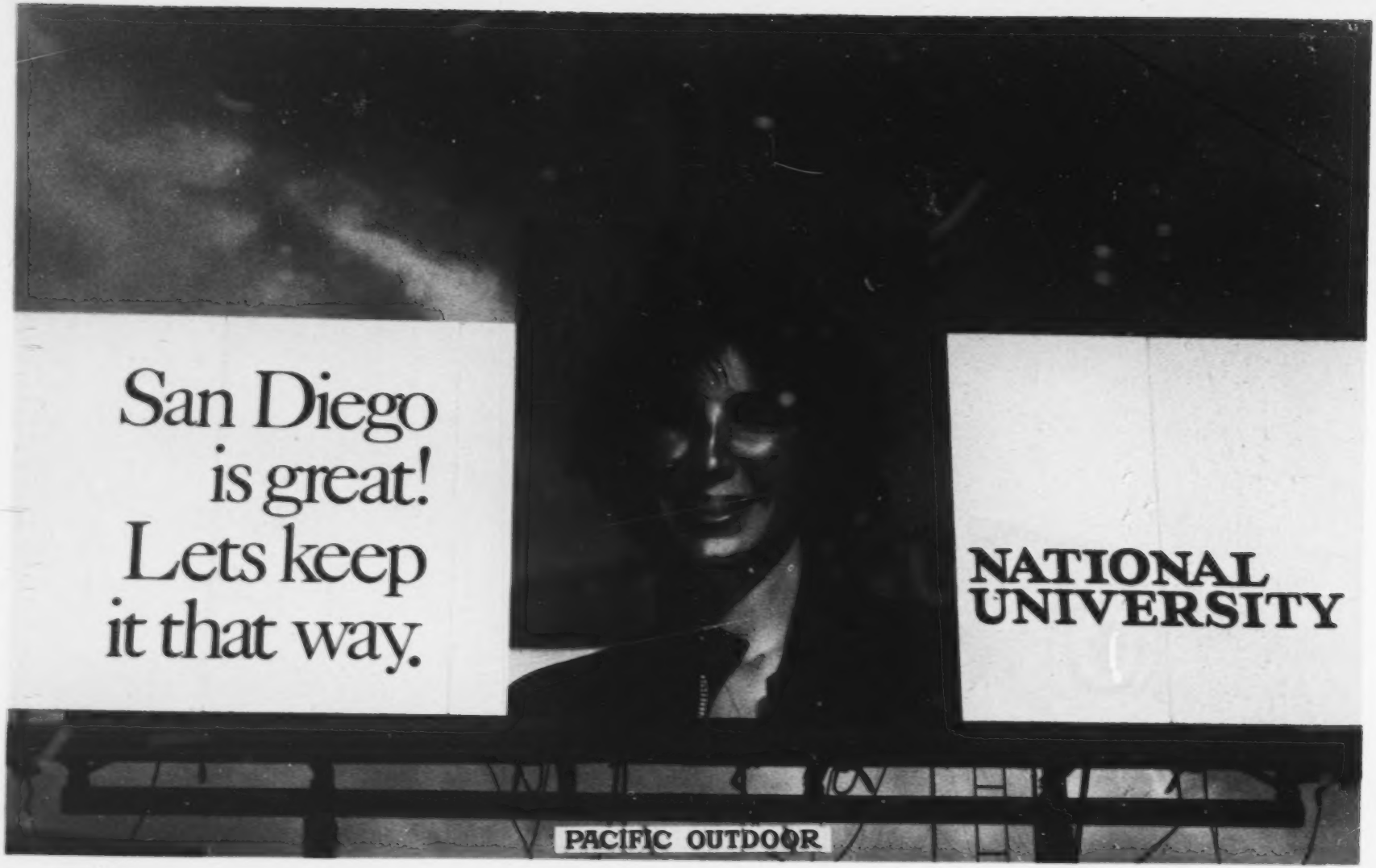

ELLER
HE DIED FOR US
WE CAN LIVE FOR HIM

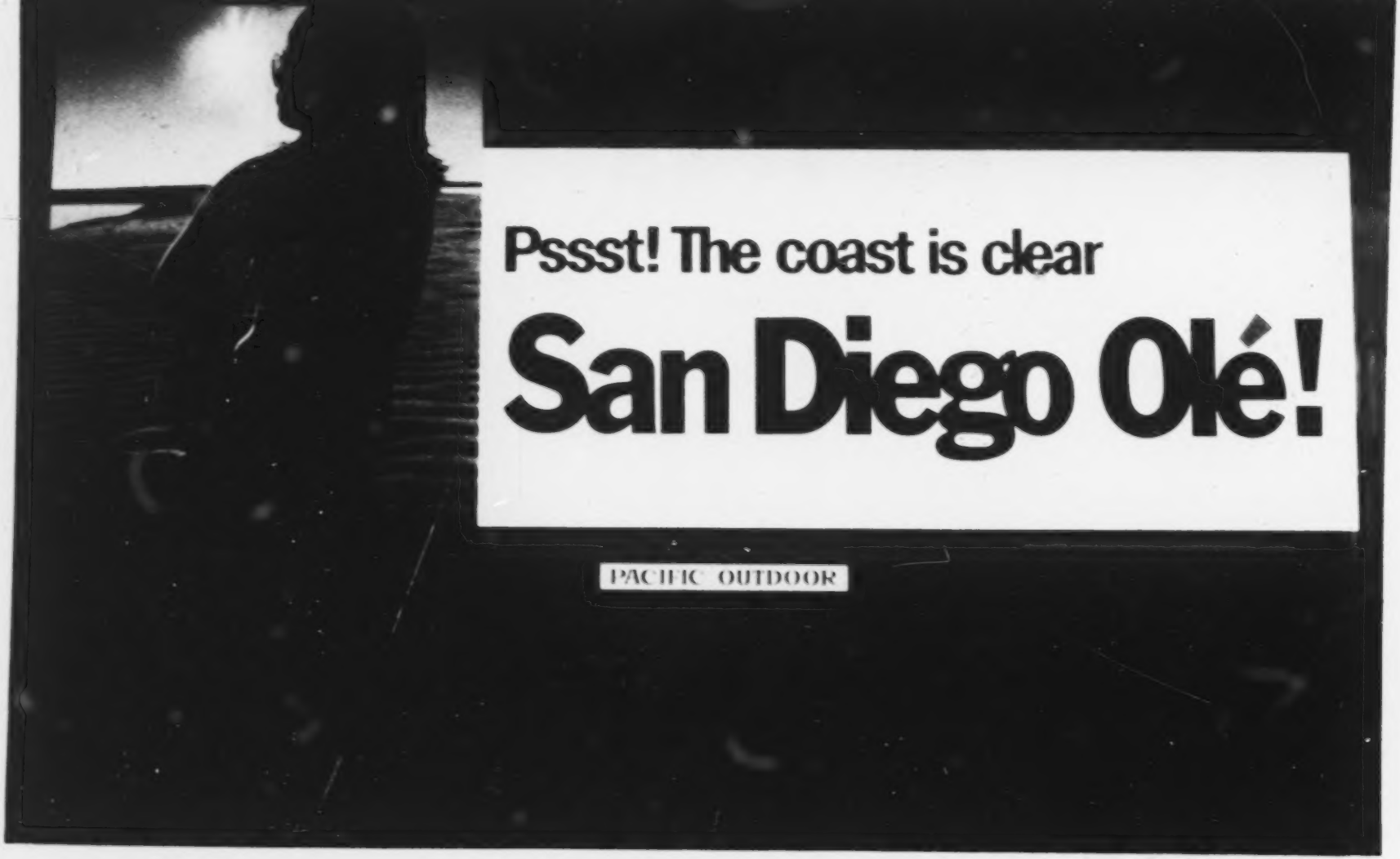

PACIFIC | OUTDOOR
THERE'S A NAME FOR PEOPLE
WHO DON'T USE SEAT BELTS.
STUPID!

55
MPH
Teaming
with you...
for SAFETY


PACIFIC OUTDOOR
E
¼ ½ ¾
F
What then?
A COMMUNITY SERVICE OF PACIFIC OUTDOOR

FOSTER and KLEISER
E 1/4 1/2 3/4 F
What then now?
A FOSTER and KLEISER PUBLIC SERVICE MESSAGE


San Diego
is great!
Lets keep
it that way.
NATIONAL
UNIVERSITY
PACIFIC OUTDOOR


Pssst! The coast is clear
San Diego Olé!
PACIFIC OUTDOOR

FILED
NOV 28 1980
MICHAEL RODAK, JR., CLERK

No. 80-195

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

METROMEDIA, INC.,

Appellant,

v.

CITY OF SAN DIEGO, a municipal corporation, and DOES I through XX, inclusive,

Appellees.

PACIFIC OUTDOOR ADVERTISING CO., INC.,

Appellant,

v.

THE CITY OF SAN DIEGO, a municipal corporation, THE CITY COUNCIL OF SAN DIEGO, VOYD BEIGHTS, Zoning Administrator of the City of San Diego and DOES 1 through 10, inclusive,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

JOINT APPENDIX

FLOYD ABRAMS
CAHILL GORDON & REINDEL
80 Pine Street
New York, N. Y. 10005
(212) 825-0100

THEODORE B. OLSON
GIBSON, DUNN & CRUTCHER
515 South Flower Street
Los Angeles, Calif. 90071
(213) 488-7000

Attorneys for Appellants

C. ALAN SUMPTION
Deputy City Attorney

JOHN W. WITT
City Attorney
Litigation Division
233 "A" Street, Suite 300
San Diego, Calif. 92101
(714) 236-7221

Attorneys for Appellees

APPEAL DOCKETED AUGUST 8, 1980

PROBABLE JURISDICTION NOTED OCTOBER 14, 1980

IN THE

Supreme Court of the United States

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ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

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Defendant's Notice of Motion and Motion for Summary Judgment, Filed December 6, 1974 ..... 54a

Excerpts from Reporter's Transcript of Proceedings of February 28, 1975 (p. 16, line 2—p. 18, line 19; p. 54, line 8—p. 56, line 16) 56a

* * *

Pursuant to Rule 30 of the Rules of this Court, the following opinions, orders, notices, constitutional and statutory provisions and exhibits have been omitted in printing this appendix because they appear on the following pages in the appendix to the Jurisdictional Statement:

Memorandum of Intended Ruling of the Superior Court of California, County of San Diego, May 27, 1975 ..... JS 81a

Order of the Superior Court of California, County of San Diego, June 27, 1975 ..... JS 98a

Vacated Opinion of the Court of Appeal, Fourth Appellate District, February 11, 1977 ..... JS 65a

Opinion of the Supreme Court of California, as Modified on Denial of Rehearing, May 14, 1980 .. JS 1a

Order of the Supreme Court of California Denying Rehearing, May 14, 1980 ..... JS 64a

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Notice of Appeal to the Supreme Court of the United States, Filed July 25, 1980 ..... JS 102a

Constitutional and Statutory Provisions .....JS 104a

Photographs illustrating political, community service and public interest messages conveyed on outdoor advertising displays in and around San Diego .....JS 128a

Chronological List of Relevant Docket Entries

DATE	PROCEEDINGS
April 26, 1972	Complaint of Plaintiff Metromedia, Inc., filed
May 10, 1972	Complaint of Plaintiff Pacific United Services Corp., filed
May 26, 1972	Answer to Complaint of Pacific United Services Corp., filed
May 28, 1972	Answer to Complaint of Metromedia, Inc., filed
March 23, 1973	Stipulation and Order of the Superior Court of the State of California, County of San Diego to Consolidate Cases, filed
May 3, 1974	Amended Complaint of Pacific Outdoor Advertising Co., filed
December 6, 1974	Plaintiffs' Joint Motion for Summary Judgment and Defendant's Notice of Motion and Motion for Summary Judgment, filed
February 28, 1975	Hearing held before the Superior Court of the State of California, County of San Diego
May 27, 1975	Memorandum of Intended Ruling of the Superior Court of California, County of San Diego
July 2, 1975	Order of the Superior Court of California, County of San Diego directing entry of judgment for plaintiffs, entered

Chronological List of Relevant Docket Entries

DATE	PROCEEDINGS
July 9, 1975	Defendant's Notice of Appeal to the Court of Appeal, Fourth Appellate District, filed
February 11, 1977	Opinion of the Court of Appeal, Fourth Appellate District*
March 22, 1977	Defendant's Petition for Hearing in the Supreme Court of California, filed
March 21, 1979	Opinion of the Supreme Court of California*
May 23, 1979	Order of Supreme Court of California granting rehearing
April 14, 1980	Opinion of the Supreme Court of California on rehearing**
May 14, 1980	Order of the Supreme Court of California denying rehearing, entered
May 14, 1980	Opinion of the Supreme Court of California as modified
July 25, 1980	Plaintiffs' Notice of Appeal to the United States Supreme Court, filed
August 9, 1980	Appeal to the United States Supreme Court, docketed
October 14, 1980	Order of the United States Supreme Court Noting Probable Jurisdiction

* Subsequently vacated.

** Subsequently modified on denial of rehearing.

Complaint of Metromedia, Inc.
Filed April 26, 1972

SUPERIOR COURT
OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

No. 332881

METROMEDIA, INC., a corporation, doing business as FOSTER AND KLEISER,

Plaintiff,

v.

CITY OF SAN DIEGO, and DOES I through XX, Inclusive,

Defendant.

HILLYER & IRWIN
OSCAR F. IRWIN
530 "B" Street, Suite 1400
San Diego, California 92101
(714) 234-6121

GIBSON, DUNN & CRUTCHER
THEODORE B. OLSON
515 South Flower Street
Los Angeles, California 90071
(213) 620-9300

Attorneys for Plaintiff
Metromedia, Inc., a
corporation, doing business
as Foster and Kleiser

Complaint of Metromedia, Inc.

COMPLAINT FOR DECLARATORY RELIEF; FOR TEMPORARY RESTRAINING ORDER; FOR PRELIMINARY INJUNCTION; and FOR PERMANENT INJUNCTION

Plaintiff, METROMEDIA, INC., a corporation, doing business as FOSTER AND KLEISER, by this verified Complaint represents and alleges as follows:

I

METROMEDIA, INC. (hereinafter referred to as "Metromedia") is a Delaware corporation duly authorized to and doing business in the State of California. Metromedia is legally engaged in the outdoor advertising business in the State of California and the City of San Diego through its Foster and Kleiser division. Metromedia has filed the statement and published the notice required by Sections 17910 and 17917 of the California Business and Professions Code with respect to its business conducted by and under the name of its Foster and Kleiser division.

II

Defendant the City of San Diego is an incorporated city located within San Diego County in the State of California.

III

The true names and capacities of the defendants identified herein as DOES I through XX, Inclusive, are unknown to plaintiff and are therefore sued herein by said fictitious names. Plaintiff is informed and believes that said defendants are officers, officials, agencies, political subdivisions and employees of the City of San Diego and are responsible for the enactment and/or enforcement of the purported ordinances hereinafter described. Plaintiff will seek leave

of court to set forth their true and correct names and capacities when the same have been ascertained. Defendants are hereinafter referred to, for convenience, simply as "defendant".

IV

At all times herein mentioned plaintiff was and now is the legal owner of numerous outdoor advertising displays located in the City of San Diego. Each such display is located on property leased by the owner thereof to the plaintiff for the purpose of maintaining outdoor advertising displays thereon. Each such display was erected in full compliance with all applicable laws of the State of California, in the County of San Diego and the City of San Diego and is being maintained in compliance with all such laws except to the extent that there is a dispute between plaintiff and defendant as to the validity and constitutionality of certain ordinances of the City of San Diego as hereinafter specified.

V

All of the outdoor advertising display signs owned and maintained by the plaintiff in the City of San Diego are either located in areas which have been zoned for commercial and industrial purposes by defendant or in areas otherwise suitable and appropriate for the maintenance and utilization of outdoor advertising displays. Each of said signs is located in an area where its use is compatible with other uses of property in the same area and each such sign was erected and is being maintained in full compliance with all building and zoning laws of the City of San Diego. Plaintiff owns over eight hundred of said signs in the City of San Diego.

VI

The display signs referred to in the foregoing paragraph produce substantial gross annual income to the plaintiff. The signs owned by the plaintiff have varying values depending upon the size, nature and location of each respective sign. Plaintiff alleges that all of said signs have a present market value considerably in excess of Two Thousand Dollars and that a substantial number of said signs have a present market value of many thousands of dollars. Each of the display signs has a remaining useful income-producing life in excess of forty (40) years. The cost of producing and erecting each display sign varies depending upon the size and nature of the sign, but is, in each instance, substantial.

VII

Outdoor advertising is customarily purchased on the basis of a presentation or campaign requiring multiple exposure. A network of signs is necessary to carry on the business and constitutes a viable integrated business and not a mere collection of separate properties. Thus, the ownership of outdoor advertising display signs in various parts of a geographic area, visible to various segments of the consuming public is essential to the profitable operation of the outdoor advertising business. Each such sign provides exposure to various portions of the populace and each sign forms an integral part of an interdependent whole. Advertisers customarily purchase advertising space from the plaintiff in a manner which affords the exposure of that advertiser's message, whether commercial, political or social, to a widespread and diverse segment of the public. As a result, each sign, in addition to producing income in

and of itself, lends value to the entire system. Each sign is worth substantially more as a part of this system than it is separately. Similarly, the subtraction of any sign in the system reduces the income-producing value of the entire system in an amount greater than the amount of the income from the particular sign. The value of each sign as a part of an overall system is not readily susceptible to precise measurement.

VIII

Outdoor advertising is a legitimate commercial use of property adjacent to roads and highways, an integral part of the business and marketing function and an established segment of the national, state and local economy. The outdoor advertising business conducted by plaintiff produces income to a variety of segments of the national, state and local economy and stimulates the flow of trade and commerce. The owners of land on which advertising displays are located receive income from the use of their property. Advertising agencies and their employees derive income from outdoor advertising. Outdoor advertising increases sales and provides numerous direct and indirect benefits to the public. Valuable commercial, political and social information is imparted to the public through the use of outdoor advertising. Many businesses, holders of official government positions and candidates for such offices and social entities rely heavily upon outdoor advertising to communicate their messages to the public because other forms of advertising are inefficient, inappropriate or prohibitively expensive.

IX

Many of the outdoor advertising signs owned by plaintiff in the City of San Diego are located within 660 feet from

the edge of the right-of-way of interstate and federal aid primary highways and the advertising copy thereon is visible from said highways.

X

Some of the signs owned by plaintiff in the City of San Diego are located on property owned by the State of California and leased to plaintiff for the operation, maintenance and use of outdoor advertising displays.

XI

On or about March 14, 1972, the City Council of the City of San Diego purported to adopt Ordinance No. 10795. Said ordinance purports to totally prohibit the erection, maintenance and use of outdoor advertising displays throughout the City of San Diego and to require the removal of all existing signs. Said ordinance requires the removal of all signs located within 500 feet of all freeways, landscaped freeways, scenic highways or freeways and parkways within 90 days following the effective date of the ordinance. All other displays within the City of San Diego are required to be removed on certain specified dates between April 1, 1973 and April 1, 1976 depending upon an "abatement schedule" which is based entirely upon the original cost of the display and the time which has elapsed since its erection. Said ordinance purports to impose upon the sign owner, the owner of the premises upon which the sign is located and the occupant of the premises upon which the sign is located the obligation to remove non-conforming signs and imposes upon said parties civil liabilities for the costs of removal of said signs. Said ordinance provides no compensation to the owners of signs or landowners for the

property which is taken and the rights which are confiscated thereby.

XII

The foregoing ordinance excludes from its prohibition various types of signs including those used for governmental advertising, bench signs located at public transit bus stops, signs on vehicles such as buses and taxicabs, off-premise subdivision signs, and signs advertising products, service and facilities manufactured, produced, sold or offered on the property on whch the sign is located.

XIII

Plaintiff is informed and believes and on that basis alleges that the ordinance described above was enacted for the purpose of discriminating against the plaintiff and others in the outdoor advertising display business and in favor of those engaged in other advertising businesses in the City of San Diego including other outdoor advertising businesses such as those engaged in real estate development, and those which utilize bus bench signs and vehicular advertising. Plaintiff is further informed and believes and on that basis alleges that said ordinance was enacted solely and exclusively to accomplish aesthetic purposes.

XIV

Defendant and its agents, servants and employees have threatened to compel the removal and destruction of the signs owned by plaintiff in the City of San Diego pursuant to the above described ordinance and have announced their intention to enforce the provisions of said ordinance and totally eliminate plaintiff's business and property in the City of San Diego through a variety of procedures. En-

forcement of such ordinance will irreparably injure the business and property of plaintiff and subject plaintiff to a multiplicity of civil and criminal actions and impair the ability of plaintiff to conduct its business in areas other than the City of San Diego.

XV

The outdoor advertising business and the display signs owned and operated by plaintiff in the City of San Diego were in existence and were being legally maintained and operated prior to the effective date of the above-described ordinance. The prohibition of outdoor advertising structures in the City of San Diego is confiscatory in nature in that it purports to compel the destruction and elimination of a useful and existing commercial enterprise from the entire City of San Diego.

XVI

Neither the outdoor advertising business generally nor the displays owned by plaintiff in the City of San Diego constitute uses which are incompatible with other permitted uses of property in the same areas. Said business is in no way inimical to the health, safety, morals or general welfare of the City of San Diego or the residents thereof. The legislation prohibiting outdoor advertising displays and requiring the removal and elimination of property and business in existence when the legislation was enacted constitutes an arbitrary, capricious, confiscatory, inconsistent, unreasonable, unequal, unwarranted and oppressive exercise of power having no reasonable relationship to the public health, safety, welfare or morals or any other legitimate object of the police power.

XVII

That portion of the ordinance of the City of San Diego which requires the removal of signs within 500 feet of freeways and other similar highways and the "abatement schedule" which sets forth the removal dates for other signs is arbitrary, unreasonable, internally and intrinsically inconsistent, irrational, discriminatory, unrealistic and unrelated to the value of the property whch is to be taken without compensation. The periods specified are not commensurate with and have no reasonable relationship to the value, useful life or the income generated by the property being taken.

XVIII

The foregoing ordinance of the City of San Diego is unconstitutional, void, invalid, unenforceable and illegal on its face, as applied to plaintiff, and in the manner in which it will be enforced in each of the following respects, severally:

A. Said ordinance purports to authorize the taking of property and the destruction and prohibition of an existing legitimate, useful, profitable, and beneficial enterprise without compensation in violation of Sections 13 and 14 of Article I of the California Constitution and the Fifth and Fourteenth Amendments to the Constitution of the United States.

B. Said ordinance constitutes an unlawful exercise of the police power in that its objects have no reasonable relationship to the public health, safety, morals or welfare and such laws constitute an unreasonable, oppressive, confiscatory and unwarranted interference with property rights in the manner in which such laws are being and will be applied

and enforced in violation of Sections 13 and 14 of Article I of the California Constitution and the Fifth and Fourteenth Amendments to the Constitution of the United States.

C. Said ordinance purports to authorize the taking of private property without compensation for purely aesthetic purposes in violation of Sections 13 and 14 of Article I of the California Constitution and the Fifth and Fourteenth Amendments to the Constitution of the United States.

D. The purported "abatement" periods specified in said ordinance between the date of enactment and the date when valuable income-producing property must be eliminated and a successful useful and beneficial business must be destroyed is arbitrary and unreasonable and in violation of Sections 13 and 14 of Article I of the California Constitution and the Fifth and Fourteenth Amendments to the Constitution of the United States.

E. The City of San Diego has neither the power nor the jurisdiction to regulate the uses of property owned by the State of California, and, to that extent, the ordinance is inapplicable to the displays belonging to plaintiff and located on property owned by the State of California.

F. Said ordinance, on its face and as applied, deprives all persons, including plaintiff and all persons interested in advertising their messages on plaintiff's property, of their right to freedom of speech, press and expression in violation of Article I, Section 9 of the California Constitution and the First and Fourteenth Amendments to the Constitution of the United States.

G. Said ordinance, on its face and as applied, conflicts with Section 131 of Title 23 of the United States Code and

therefore violates Section 2 of Article VI of the Constitution of the United States.

H. Said ordinance is in direct conflict with and is prohibited by the provisions of the California Outdoor Advertising Act (Bus. & Prof. Code §5200 et seq.) and is, accordingly, beyond the power and jurisdiction of the City of San Diego.

I. Said ordinance, on its face and as applied, constitutes a denial to the plaintiff of equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

J. Said ordinance is vague, confusing, misleading, ambiguous and inconsistent and, as such, deprives plaintiff of due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

K. Said ordinance constitutes an unlawful delegation of legislative and quasi-judicial power and, as such, deprives plaintiff of procedural and substantive due process and is unconstitutional and void.

XIX

An actual controversy has arisen and now exists between the plaintiff and defendant relative to their respective rights and duties in that plaintiff contends that the laws referred to herein are unconstitutional, void and unenforceable on their face and as applied to plaintiff for the reasons set forth herein, whereas defendant disputes such contentions and contends that said laws are valid and enforceable on their face and as applied to plaintiff.

XX

Plaintiff seeks a declaration of its rights with respect to the constitutionality, validity and enforceability of said ordinance, on its face and as applied to plaintiff. Such a declaration is necessary and appropriate in order that plaintiff may determine its rights with respect to its property and its business and avoid the elimination, prohibition and destruction of its property and its business and avoid the expense and inconvenience of a multiplicity of confusing, unnecessary, inequitable and repetitious actions.

XXI

The City of San Diego Municipal Code affords plaintiff no administrative relief from the enforcement of said unconstitutional, illegal and void ordinance.

WHEREFORE, plaintiff prays for judgment as follows:

(1) Declaring that all ordinances of the City of San Diego which purport to prohibit the maintenance and use of outdoor advertising displays in the City of San Diego and specifically Ordinance No. 10795 are unconstitutional and void on their face and as applied to the plaintiff.

(2) Declaring that plaintiff is entitled to continue to erect and maintain outdoor advertising displays constructed and owned by it in the City of San Diego.

(3) For a temporary restraining order, preliminary injunction and permanent injunction enjoining defendant from enforcing or attempting to enforce any and all provisions of the San Diego Municipal Code which prohibits the existence, erection, maintenance or use of outdoor advertising displays in the City of San Diego.

(4) For plaintiff's costs of suit and any other appropriate relief, writ or remedy as the court may deem just and proper.

Dated: April 26, 1972.

HILLYER & IRWIN
OSCAR F. IRWIN
and
GIBSON, DUNN & CRUTCHER
THEODORE B. OLSON

By /s/ THEODORE B. OLSON
Theodore B. Olson
Attorneys for Plaintiff

Answer to Complaint of Metromedia, Inc.
Filed May 28, 1972

SUPERIOR COURT
OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

No. 332881

METROMEDIA, INC., a corporation, doing business as FOSTER AND KLEISER,

Plaintiff,

v.

CITY OF SAN DIEGO, and DOES I through XX, Inclusive,

Defendant.

JOHN W. WITT, City Attorney
C. ALAN SUMPTION, Deputy City Attorney
City Administration Building
Community Concourse
202 C Street
San Diego, California 92101
Telephone: 236-6220

Attorneys for Defendant

ANSWER TO COMPLAINT FOR DECLARATORY RELIEF; FOR TEMPORARY RESTRAINING ORDER; FOR PRELIMINARY INJUNCTION; AND FOR PERMANENT INJUNCTION

Defendant The City of San Diego, a municipal corporation, answers the complaint herein by admitting and denying as follows:

Answer to Complaint of Metromedia, Inc.

I

In answer to the allegations contained in paragraph I, defendant City admits that Metromedia, Inc. (hereinafter referred to as "Metromedia"), is a Delaware corporation duly authorized to and doing business in the State of California and is engaged in the outdoor advertising business in California and the City of San Diego through its Foster and Kleiser division.

In answer to the allegations on page 1, lines 30 to 32, inclusive, and on page 2, line 1, defendant has no information or belief sufficient to enable it to answer those allegations and placing its denial on that ground denies said allegations.

Defendant denies each and every other allegation contained in paragraph I.

II

In answer to the allegations of paragraph II, defendant admits each and every allegation contained therein.

III

In answer to the allegations of paragraph III, defendant has no information or belief sufficient to enable it to answer said allegations and placing its denial on that ground denies each and every allegation contained therein.

IV

In answer to the allegations of paragraph IV, defendant admits plaintiff was and now is the owner of numerous outdoor advertising displays located in the City of San Diego.

With respect to the allegations set forth at page 2, lines 20 to 22, inclusive, beginning with the word "Each" and

ending with the word "thereon," defendant has no information or belief sufficient to enable it to answer said allegations and placing its denial on that ground denies each and every allegation therein.

Defendant denies each and every other allegation contained in paragraph IV.

V

In answer to the allegations of paragraph V, defendant has no information or belief sufficient to enable it to answer the allegations on page 3, lines 7 and 8, beginning with the word "Plaintiff," and placing its denial on that ground denies each and every allegation contained therein.

Defendant denies each and every other allegation contained in paragraph V.

VI

In answer to the allegations of paragraph VI, defendant has no information or belief sufficient to enable it to answer said allegations and placing its denial on that ground denies each and every allegation contained therein.

VII

In answer to the allegations of paragraph VII, defendant has no information or belief sufficient to enable it to answer said allegations and placing its denial on that ground denies each and every allegation contained therein.

VIII

In answer to the allegations of paragraph VIII, defendant denies each and every allegation contained in paragraph VIII.

IX

In answer to the allegations of paragraph IX, defendant admits each and every allegation thereof.

X

In answer to the allegations of paragraph X, defendant has no information or belief sufficient to enable it to answer said allegations and placing its denial on that ground denies each and every allegation contained therein.

XI

In answer to the allegations of paragraph XI, defendant admits that on or about March 14, 1972, the City Council of The City of San Diego adopted Ordinance No. 10795 (New Series).

Defendant denies each and every other allegation contained in paragraph XI.

XII

In answer to the allegations of paragraph XII, defendant admits that San Diego Municipal Code Section 101.0700, paragraph F., as adopted by Ordinance No. 10795 (New Series), provides for certain exemptions from the sign regulations.

Defendant denies each and every other allegation contained in paragraph XII.

XIII

In answer to the allegations of paragraph XIII, defendant denies each and every allegation contained therein.

XIV

In answer to the allegations of paragraph XIV, defendant admits that its agents, servants and employees have

announced their intention to enforce the provisions of Ordinance No. 10795 (New Series), but defendant denies each and every other allegation contained therein.

XV

In answer to the allegations of paragraph XV, defendant denies each and every allegation contained therein.

XVI

In answer to the allegations of paragraph XVI, defendant denies each and every allegation contained therein.

XVII

In answer to the allegations of paragraph XVII, defendant denies each and every allegation contained therein.

XVIII

In answer to the allegations of paragraph XVIII, defendant denies each and every allegation contained therein.

XIX

In answer to the allegations of paragraph XIX, defendant admits the allegations therein.

XX

In answer to the allegations of paragraph XX, defendant denies each and every allegation contained therein.

XXI

In answer to the allegations of paragraph XXI, defendant denies each and every allegation contained therein.

WHEREFORE, defendant prays for judgment as follows:

1. That the temporary restraining order be dissolved;

2. That no preliminary injunction be issued;

3. That no permanent injunction be issued;

4. That Ordinance No. 10795 (New Series) and any other City ordinance in issue be declared valid on its face and as applied;

5. For costs of suit incurred herein; and

6. For such other and further relief as the court deems proper.

JOHN W. WITT, City Attorney

By /s/ C. ALAN SUMPTION
C. Alan Sumption, Deputy

Attorneys for Defendant

VERIFICATION

I am the attorney for the defendant The City of San Diego in the above entitled action; I have read the foregoing ANSWER TO COMPLAINT FOR DECLARATORY RELIEF; FOR TEMPORARY RESTRAINING ORDER; FOR PRELIMINARY INJUNCTION; and FOR PERMANENT INJUNCTION and know the contents thereof; and I certify that the same is true of my own knowledge except as to those matters which are therein stated upon information or belief and as to those matters I believe to be true.

I certify, under penalty of perjury that the foregoing is true and correct.

Dated this 26 day of May, 1972, at San Diego, California.

/s/ C. ALAN SUMPTION

Complaint of Pacific United Services Corp.
Filed May 10, 1972

SUPERIOR COURT
OF THE STATE OF CALIFORNIA

No. 333292

PACIFIC UNITED SERVICES CORP., a California corporation, doing business under the fictitious name and style of PACIFIC OUTDOOR ADVERTISING CO.,

Plaintiff,

vs.

THE CITY OF SAN DIEGO, a municipal corporation, THE CITY COUNCIL OF SAN DIEGO, VOYD BEIGHTS, Zoning Administrator of the City of San Diego and DOES 1 through 10, inclusive,

Defendants.

IVERSON, YOAKUM, PAPIANO & HATCH
611 West Sixth Street
Suite 1900
Los Angeles, California 90017
687-0711

Attorneys for Plaintiff

Plaintiff alleges:

1. Plaintiff, Pacific United Services Corp., is, and at all times herein mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of California doing business within the City and County of San Diego under the fictitious name and style of Pacific

Outdoor Advertising Co., hereinafter referred to as: "Pacific Outdoor".

2. Defendant, The City of San Diego, is, and at all times herein mentioned was a municipal corporation located within the County of San Diego, organized and existing under, and by virtue of the Constitution and laws of the State of California.

3. Defendant, The City Council of the City of San Diego is and at all times herein mentioned was the legislative body of the City of San Diego and in said form caused the enactment of the hereinafter specified ordinance and occasioned the damages complained of herein.

4. Defendant, Voyd Beights is, and at all times herein mentioned was the Zoning Administrator of the City of San Diego and is the person charged by the laws of said city with administering and enforcing the hereinafter specified ordinance.

5. The true names and capacities of the defendants designated herein as Does 1 to 10, inclusive, are now unknown to plaintiff who therefore sues said defendants by such fictitious names; plaintiff will ask leave of court to amend this complaint to show the true names and capacities of said defendants when same have been ascertained.

6. At all times therein mentioned there was, and is now a comprehensive zoning plan in effect within the City of San Diego whereby all land area within said city is divided into zones of permitted uses, including, but not limited to industrial and commercial activities.

7. At all times herein mentioned there were, and are now areas of land use within the City of San Diego devoted to heavy manufacturing, military and governmental activities, transportation and wholesale trade, among other uses.

8. Plaintiff, Pacific Outdoor Advertising, together with its predecessor in interest, the Cordtz Company, has been continuously engaged in the business of outdoor advertising within the City of San Diego for more than 60 years.

9. The activity upon which plaintiff's business depends for its continued existence is the construction and maintenance of off-premises outdoor advertising displays at various locations within the City of San Diego.

10. Plaintiff now owns and maintains 624 such signs within the City of San Diego each of which was constructed and is now maintained in compliance with all state and local laws and ordinances.

11. At all times herein mentioned each of said 624 signs was, and is now located within a district zoned for commercial or industrial use, or otherwise suitable and appropriate for purposes of off-premises outdoor advertising.

12. At all times herein mentioned, many of said 624 signs were, and are now located within 660 feet, and others within 500 feet, from the edge of the right-of-way of interstate or federal aid primary highways within the City of San Diego and are designed to be viewed therefrom.

13. At all times herein mentioned said business of plaintiff, including its construction and maintenance of said 624 signs, is and was lawful, not inherently harmful or otherwise detrimental to the general welfare of the residents and visitors to the City of San Diego.

14. On or about March 14, 1972, defendant City Council of the City of San Diego enacted Ordinance No. 10795, entitled: General Sign Regulations—Sec. 101.0700—Prohibition and Abatement of Outdoor Advertising Display Signs, a true copy of said ordinance is attached hereto, marked Exhibit "A" and incorporated by reference herein.

15. The purpose and effect of said ordinance is to prohibit the further construction and maintenance of off-premises outdoor advertising signs; to prohibit the further use of real property for off-premises outdoor advertising purposes; to prohibit the pursuit of the business of off-premises outdoor advertising; and to require the removal of all existing off-premises outdoor advertising signs.

16. Under the terms of said ordinance, all existing off-premises outdoor advertising signs within the City of San Diego are to be removed in accordance with an "Abatement Schedule" set forth therein, whereby:

(1) All off-premises outdoor advertising signs located within 500 feet of certain freeways and highways, including interstate and federal aid primary highways, must be removed within 90 days following the effective date of said ordinance;

(2) All remaining off-premises signs must be removed in compliance with a graduated schedule requiring the

total elimination of all such signs within four years from the effective date of said ordinance.

(3) No compensation is paid by defendants for requiring the removal of any existing off-premises outdoor advertising sign.

17. On or about April 13, 1972, said ordinance went into full force and effect and is now being enforced by defendants.

18. Each of said 624 signs belonging to plaintiff has a reasonable replacement value in excess of $2,000, a remaining economic life in excess of 25 years and the aggregate value of said structures to plaintiff's overall business is in excess of many millions of dollars.

19. Under the terms of said ordinance, defendants claim the right to, and do on account thereof, threaten to remove the aforesaid 624 outdoor advertising signs should plaintiff fail to so remove said signs in compliance with the provisions of said ordinance.

20. Under the terms of said ordinance, any sign deemed to be in violation thereof shall be removed by the owner of the property where the sign is located or ultimately, by defendant if plaintiff should fail to do so.

21. Under the terms of said ordinance, defendant Beights as Zoning Administrator, may, in his discretion create a civil liability against the owner of any sign or the owner of the property upon which such sign is located, should said defendant elect to cause its removal in the manner set forth in Paragraph 20, herein.

22. Said ordinance constitutes a portion of the San Diego Municipal Code; Section 11.12 thereof provides that failure to comply with any of the provisions of said Code is punishable as a misdemeanor.

23. Under the terms of said ordinance, other forms of outdoor advertising are excluded from its prohibition, including advertisements on taxi-cabs, buses, bus-benches, off-premises real estate subdivision signs, and all on-premises outdoor advertising signs.

24. Should defendants continue to enforce said ordinance, plaintiff will be prevented from engaging in the business of outdoor advertising; plaintiff will suffer the loss of its property, business and employees; and will, on account thereof, suffer substantial monetary damages and irreparable injury and loss; plaintiff will further become subject to the multiplicity of civil and criminal prosecution by defendants.

25. An actual controversy has arisen and now exists between plaintiff and defendants relative to their respective rights and duties herein. Plaintiff contends that said ordinance is invalid and unconstitutional on its face and as applied, as more particularly set forth herein; while defendants contend that said ordinance is valid and constitutional. Plaintiff desires to continue to pursue the business of outdoor advertising but is fearful of the consequences alleged herein and accordingly brings this proceeding as the only reasonable method of challenging the validity thereof. Said ordinance is invalid, unconstitutional and unenforceable on each of the following grounds:

A. Defendants' total prohibition of off-premises outdoor advertising signs within the City of San Diego bears no

reasonable relationship to any legitimate object of police power and accordingly, said ordinance constitutes an unreasonable and arbitrary exercise thereof in violation of the 5th and 14th Amendments to the United States Constitution and Article I, Sections 13 and 14 of the California Constitution.

B. Defendants' total prohibition of off-premises outdoor advertising signs within the City of San Diego as a means to achieve the purported objects of the ordinance herein is harsh, unnecessary, arbitrary and unreasonable and therefore said ordinance is in violation of the 5th and 14th Amendments to the United States Constitution and Article I, Sections 13 and 14 of the California Constitution.

C. The purposes and intent of said ordinance are not legitimate objects of defendants' police power.

D. Said ordinance purports to authorize the taking of plaintiff's vested property rights without compensation and accordingly, said ordinance denies plaintiff the right of due process in violation of the 5th and 14th Amendments to the United States Constitution and Article I, Sections 12 and 13 of the California Constitution.

E. The business of Outdoor Advertising, including the construction and maintenance of off-premises outdoor advertising signs, is an established segment of the National Economy and by prohibiting such signs within the City of San Diego defendants by said ordinance have created an unnecessary and unreasonable obstruction to, and burden upon interstate commerce; said ordinance therefore violates Article VI of the United States Constitution.

F. By totally prohibiting off-premises outdoor advertising signs within the City of San Diego said ordinance

is in direct conflict with Title 23 of the United States Code, Section 131 thereof, and accordingly said ordinance violates Article VI of the Constitution of the United States.

G. By totally prohibiting off-premises outdoor advertising signs within the City of San Diego, said ordinance is in direct conflict with Business & Professions Code, Section 5200 et seq., and is therefore in violation of Article XI, Section 11 of the California Constitution.

H. Outdoor advertising signs carry messages which constitute protected free speech which, by reason of defendants' ordinance, has been arbitrarily restrained, abridged and denied; all in violation of the 1st and 14th Amendments to the United States Constitution and Article I, Section 9 of the California Constitution.

I. Insofar as said ordinance applies to off-premises outdoor advertising signs located within 660 feet from the edge of Interstate or federal aid primary highways, the purported objects of said ordinance have been preempted by Title 23 of the United States Code, Section 131 et seq.

J. Insofar as said ordinance applies to off-premises outdoor advertising signs located within 660 feet from the edge of interstate of federal aid primary highways, the purported objects of said ordinance have been preempted by Business & Professions Code, Section 5200 et seq., and therefore violates Article XI, Section 11 of the California Constitution.

K. Insofar as said ordinance applies to plaintiff's off-premises outdoor advertising signs located within 500 feet from the edge of interstate and federal aid primary highways, enforcement of said ordinance will deprive plaintiff of its vested right to $589,742 in compensation from the

State of California pursuant to Title 23 of the United States Code, Section 131, and Business & Professions Code, Section 5200 et seq.; according, said ordinance purports to authorize the taking of plaintiff's property without just compensation in violation of the 5th and 14th Amendments to the Constitution of the United States and Article I, Sections 13 and 14 of the California Constitution.

L. Insofar as said ordinance purports to authorize the removal of plaintiff's off-premises outdoor advertising signs located within 500 feet from the edge of interstate or federal aid primary highways, without compensation, enforcements of said ordinance will, by reason of Title 23, United States Code, Section 131, subject the State of California to the loss of ten per cent of the highway funds that would otherwise be allocated to it by the Federal Government; such legislation is, accordingly, beyond the municipal police power of defendants.

M. The abatement schedule set forth in said ordinance violates the 5th and 14th Amendments to the United States Constitution and Article I, Sections 13 and 14 of the California Constitution in that the purported amortization period as applied to plaintiff's signs is arbitrary, unreasonable and otherwise confiscatory.

N. The abatement schedule set forth in said ordinance violates the 5th and 14th Amendments to the United States Constitution and Article I, Sections 13 and 14 of the California Constitution in that the purported amortization period, as same effects a closing of plaintiff's business, is arbitrary, unreasonable and otherwise confiscatory.

O. Said ordinance on its face, and as applied, constitutes an unreasonable and arbitrary distinction between

similarly situated classes of individuals, and thereby denies plaintiff equal protection of the laws in violation of the 14th Amendment to the Constitution of the United States.

P. Said ordinance violates the 5th and 14th Amendments to the United States Constitution because its terms are so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.

Q. Plaintiff has heretofore entered into lawful and profitable contracts with third persons to display their messages on plaintiff's outdoor advertising signs located within the City of San Diego; at all times herein mentioned said contracts were and are now executory in nature, extending into the future for various lengths of time. Through said ordinance defendants seek to unlawfully take, impair, obstruct and destroy plaintiff's rights in said contract in violation of Article I, Section 10 of the United States Constitution and the 5th and 14th Amendments thereto; and Article I, Sections 13, 14 and 16 of the California Constitution.

26. On or about April 2, 1972, defendants' attorney, John Witt, stated on behalf of the City of San Diego:

> "Now we have billboard regulations and a policy saying we're going to phase out this type of activity . . . the decision by the council dictates that there should be a vigorous effort to get all the illegal signs down."

27. Defendants intend to, and will, unless restrained by an order of this court, cause the removal of plaintiff's aforementioned signs pursuant to the ordinance complained of herein.

28. As a direct and proximate result of the conduct of defendants, and each of them, and the conditions wrongfully created thereby, plaintiff has suffered, and will continue to suffer irreparable injury and monetary damages to its vested property rights, the exact amount of which is now unknown. Leave of court will be sought to amend this complaint and insert the correct amount of monetary damages at such time as they are ascertained.

29. Plaintiff has exhausted all available administrative remedies to be pursued by it and has no plain, speedy or otherwise adequate remedy at law.

WHEREFORE, plaintiff prays for a declaratory judgment as follows:

1. That this court declare the respective rights and duties of plaintiff and defendants with respect to said ordinance and that it be declared and adjudged that Ordinance No. 10795 is invalid and unconstitutional on its face and as applied to plaintiff;

2. That during the pendency of this litigation, defendants and each of them be enjoined and restrained from further enforcing or attempting to enforce said ordinance;

3. For a temporary restraining order;

4. For damages according to proof;

5. For costs of suit incurred herein.

IVERSON, YOAKUM, PAPIANO & HATCH

By /s/ WILLIAM S. CHRISTOPHER
William S. Christopher
Attorneys for Plaintiff

Answer to Complaint of Pacific United Services Corp. Filed May 26, 1972

SUPERIOR COURT
OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

No. 333292

PACIFIC UNITED SERVICES CORP., a California corporation, doing business under the fictitious name and style of PACIFIC OUTDOOR ADVERTISING CO.,

Plaintiff,

v.

THE CITY OF SAN DIEGO, a municipal corporation, THE CITY COUNCIL OF SAN DIEGO, BOYD [sic] BEIGHTS, Zoning Administrator of the City of San Diego and DOES 1 through 10, inclusive,

Defendants.

JOHN W. WITT, City Attorney
C. ALAN SUMPTION, Deputy City Attorney
City Administration Building
Community Concourse
202 C Street
San Diego, California 92101
Telephone: 236-6220

Attorneys for Defendants

Answer to Complaint of Pacific United Services Corp.

ANSWER TO COMPLAINT FOR DECLARATORY RELIEF AND INJUNCTION

Defendants The City of San Diego, a municipal corporation, The City Council of The City of San Diego, and Voyd Beights, Zoning Administrator of The City of San Diego, answer the complaint herein by admitting and denying as follows:

I

In answer to the allegations of paragraph I, defendants have no information or belief sufficient to enable them to answer said allegations and placing their denial on that ground deny each and every allegation contained therein.

II

In answer to the allegations of paragraph II, defendants admit each and every allegation contained therein.

III

In answer to the allegations of paragraph III, defendants admit the defendant City Council of The City of San Diego is the legislative body of The City of San Diego, and in that capacity, enacted Ordinance No. 10795 (New Series).

Defendants deny each and every other allegation contained in paragraph III.

IV

In answer to the allegations of paragraph IV, defendants admit each and every allegation contained therein.

V

In answer to the allegations of paragraph V, defendants have no information or belief sufficient to enable them to

answer said allegations and placing their denial on that ground deny each and every allegation contained therein.

VI

In answer to the allegations of paragraph VI, defendants admit each and every allegation contained therein.

VII

In answer to the allegations of paragraph VII, defendants admit each and every allegation contained therein.

VIII

In answer to the allegations of paragraph VIII, defendants have no information or belief sufficient to enable them to answer said allegations and placing their denial on that ground deny each and every allegation contained therein.

IX

In answer to the allegations of paragraph IX, defendants have no information or belief sufficient to enable them to answer said allegations and placing their denial on that ground deny each and every allegation contained therein.

X

In answer to the allegations of paragraph X, defendants have no information or belief sufficient to enable them to answer the allegations on page 2, line 32, and page 3, line 1, ending with the word "San Diego," and placing their denial on that ground deny each and every allegation contained therein.

Defendants deny each and every other allegation contained in paragraph X.

Answer to Complaint of Pacific United Services Corp.

XI

In answer to the allegations of paragraph XI, defendants deny each and every allegation contained therein.

XII

In answer to the allegations of paragraph XII, defendants admit that some of plaintiff's signs are within 500 feet from the edge of interstate or federal-aid primary highways within San Diego and are designed to be viewed therefrom.

Defendants have no information or belief sufficient to enable them to answer the remaining allegations of paragraph XII, and placing their denial on that ground deny each and every remaining allegation therein.

XIII

In answer to the allegations of paragraph XIII, defendants deny each and every allegation contained therein.

XIV

In answer to the allegations of paragraph XIV, defendants admit each and every allegation contained therein.

XV

In answer to the allegations of paragraph XV, defendants admit the effect of said ordinance is to prohibit the further construction and maintenance of certain off-premises outdoor advertising signs; to prohibit the further use of real property for off-premises outdoor advertising purposes; and to require the removal of all existing off-premises outdoor advertising signs.

Defendants deny each and every other allegation contained in paragraph XV.

XVI

In answer to the allegations of paragraph XVI, defendants admit each and every allegation contained therein.

XVII

In answer to the allegations of paragraph XVII, defendants admit each and every allegation contained therein.

XVIII

In answer to the allegations of paragraph XVIII, defendants have no information or belief sufficient to enable them to answer said allegations and placing their denial on that ground deny each and every allegation contained therein.

XIX

In answer to the allegations of paragraph XIX, defendants admit each and every allegation contained therein.

XX

In answer to the allegations of paragraph XX, defendants admit each and every allegation contained therein.

XXI

In answer to the allegations of paragraph XXI, defendants admit each and every allegation contained therein.

XXII

In answer to the allegations of paragraph XXII, defendants admit each and every allegation contained therein.

XXIII

In answer to the allegations of paragraph XXIII, defendants admit that certain signs are exempt from the provisions of Ordinance No. 10795 (New Series), by paragraph "F." of San Diego Municipal Code, Section 101.0700.

Defendants deny each and every other allegation contained in paragraph XXIII.

XXIV

In answer to the allegations of paragraph XXIV, defendants admit that if plaintiff violates the provisions of Ordinance No. 10795 (New Series), it will become subject to civil and criminal lawsuits by defendants.

Defendants deny each and every other allegation contained in paragraph XXIV.

XXV

In answer to the allegations of paragraph XXV, defendants admit the allegations at page 5, lines 20 to 25, inclusive, ending with the word "constitutional," but defendants deny each and every remaining allegation therein.

XXVI

In answer to the allegations of paragraph XXVI, defendants have no information or belief sufficient to enable it to answer said allegations and placing its denial on that ground denies each and every allegation contained therein.

XXVII

In answer to the allegations of paragraph XXVII, defendants admit defendants intend to and will cause the

removal of any signs in violation of the provisions of Ordinance No. 10795 (New Series), but deny each and every other allegation therein.

XXVIII

In answer to the allegations of paragraph XXVIII, defendants deny each and every allegation in paragraph XXVIII.

XXIX

In answer to the allegations of paragraph XXIX, defendants deny each and every allegation in paragraph XXIX.

WHEREFORE, defendants pray for judgment as follows:

1. That the temporary restraining order be dissolved;

2. That no preliminary injunction be issued;

3. That no permanent injunction be issued;

4. That the court declare Ordinance No. 10795 (New Series) valid and constitutional on its face and as applied;

5. That plaintiff take nothing by this action;

6. For costs of suit incurred herein; and

7. For such other and further relief as the court deems proper.

JOHN W. WITT, City Attorney

By /s/ C. ALAN SUMPTION
C. Alan Sumption, Deputy

Attorneys for Defendant

Answer to Complaint of Pacific United Services Corp.

VERIFICATION

I am the attorney for the defendant The City of San Diego in the above entitled action; I have read the foregoing ANSWER TO COMPLAINT FOR DECLARATORY RELIEF AND INJUNCTION and know the contents thereof; and I certify that the same is true of my own knowledge except as to those matters which are therein stated upon information or belief and as to those matters I believe to be true.

I certify, under penalty of perjury that the foregoing is true and correct.

Dated this 26 day of May, 1972, at San Diego, California.

/s/ C. ALAN SUMPTION

* * * * *

Pursuant to a stipulation of the parties and Order of the Superior Court dated April 29, 1974, an Amended Complaint was filed reflecting the substitution of new party plaintiff Pacific Outdoor Advertising Co., Inc., the successor to Pacific United Services Corp. The Order of the Superior Court further provided that all of the material allegations of the Amended Complaint were to be deemed denied by defendants. (See Clerk's Transcript at 518-20.)

Joint Stipulation of Facts
Filed December 6, 1974

SUPERIOR COURT
OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

No. 332881

METROMEDIA, INC., a corporation, doing business as FOSTER AND KLEISER,

Plaintiff,

v.

CITY OF SAN DIEGO, a municipal corporation, and DOES I through XX, Inclusive,

Defendants.

PACIFIC OUTDOOR ADVERTISING CO., INC., an Arizona corporation,

Plaintiff,

v.

THE CITY OF SAN DIEGO, a municipal corporation, THE CITY COUNCIL OF SAN DIEGO, BOYD BEIGHTS, Zoning Administrator of the City of San Diego and DOES 1 through 10, inclusive,

Defendants.

(Consolidated)

JOINT STIPULATION OF FACTS

The parties to this litigation are filing cross-motions for summary judgment. This Stipulation of Facts is entered

into for the purpose of these motions and for any judgment thereon or appeals therefrom and for no other purpose. The parties agree that the facts specified herein are true for said purposes only and none of the parties hereto shall be bound thereby for any other purposes.

STIPULATED FACTS

1. On March 14, 1972, the City Council of the City of San Diego adopted Ordinance No. 10795, a true, correct and complete copy of which is attached hereto and incorporated herein by reference as Exhibit A.

2. If enforced as written, Ordinance No. 10795 will eliminate the outdoor advertising business in the City of San Diego.

3. The City of San Diego, with a population of 750,000 people,* is the second most populated city in the State of California, the most populated state in the nation.

4. The City of San Diego is the seat of the county government of the County of San Diego. The County has a population in excess of 1,500,000 persons.**

5. The City of San Diego contains approximately 320 square miles or 204,800 acres.

6. The City of San Diego is multi-faceted, containing beaches, hills, residential areas, parks, a major seaport and naval base, a substantial commercial area, hundreds of

---

* As of April, 1974.

** As of April, 1974.

miles of streets, highways and freeways, a large industrial area, a major airport and numerous major industries.

7. The citizens of the City of San Diego derive their livelihood from a variety of sources, including retail businesses, heavy industry, commercial centers, tourist services, agriculture, government contracts, wholesale supplies and a variety of services.

8. The homes, commercial structures and industrial facilities of the City of San Diego are of all vintages, old and new. Some sections of the City of San Diego are scenic, some blighted, some containing strips of vehicle related commercial uses, some contain new and attractive office buildings, some functional industrial development and some areas contain older but useful commercial establishments.

9. Approximately 13% of the City of San Diego is zoned for residential purposes, 1.4% for commercial uses, 1.4% industrial, 8.5% for streets and highways, 20% for public and semi-public uses and the balance is vacant or used for agricultural purposes.*

10. The City of San Diego General Plan adopted in 1967 indicates its citizens found employment substantially as follows in the year 1962:**

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* These figures are approximate figures for 1967, the date of the San Diego General Plan. The same general proportions may be considered valid for all other periods relevant to this litigation.

** Certain minor fractions have been omitted from this table. While the fractions specified have undoubtedly fluctuated over the years, such changes would be of such magnitude as not to be material to this motion. Therefore, these figures may be taken as true for all periods relevant to this litigation.

Agriculture	1.6%
Construction	6.6%
Manufacturing	22.4%
Transportation, Communication and Utilities	4.7%
Wholesale Trade	3.2%
Retail Trade	17.5%
Finance, Insurance and Real Estate	4.5%
Services	19.2%
Government	19.7%

11. The City of San Diego General Plan of 1967 projected a 1985 population of almost double that of 1967.

12. Both of the plaintiffs are companies legally engaged in the outdoor advertising business in the City of San Diego and the State of California (Defendant, of course, contends that Ordinance No. 10795 is legal and valid and that plaintiffs are currently in violation of this Ordinance. Accordingly, to this extent, defendant does not admit that plaintiffs are at this time "legally engaged in business in the City of San Diego."

13. Each of the plaintiffs are the owners of a substantial number of outdoor advertising displays (approximately 500 to 800) in the City of San Diego.

14. Substantially all of the displays owned by plaintiffs are located on property leased by the owners thereof to

the plaintiffs for the purposes of maintaining outdoor advertising displays thereon.*

15. Each of the displays were legally erected in full compliance with all applicable municipal and state laws and are in full compliance with such laws except for the contested legality of Ordinance No. 10795.

16. The cost of producing and erecting each display was substantial.

17. The displays have varying values depending upon their size, nature and location.

18. Each of the displays has a fair market value, as a part of an income-producing system, of between $2,500 and $25,000.

19. Each display has a remaining useful income-producing life in excess of 25 years.

20. All of the signs owned by plaintiffs in the City of San Diego are located at areas zoned for commercial and industrial purposes.

21. Outdoor advertising is a means of communication and a media for the expression of ideas.

22. There is a difference between the outdoor advertising business and "on-site" or business signs. On-site signs advertise businesses, goods or services available on the property on which the sign is located. On the other hand, the outdoor advertising businesses lease real property and

* A few may be located on property owned by the plaintiffs.

erect signs thereon which are made available to national and local advertisers for commercial, political and social messages. Outdoor advertising is different from on-site advertising in that:

(a) The outdoor advertising sign seldom advertises goods or services sold or made available on the premises on which the sign is located.

(b) The outdoor advertising sign seldom advertises products or services sold or made available by the owner of the sign.

(c) The outdoor advertising sign is, generally speaking, made available to "all-comers", in a fashion similar to newspaper or broadcasting advertising. It is a forum for the communication of messages to the public.

(d) The copy of the outdoor advertising sign changes, usually monthly. For example, a particular sign may advertise a local savings and loan association one month, a candidate for mayor the next month, the San Diego Zoo the third month, a new car the fourth month, and a union grievance the fifth month.

23. Outdoor advertising is available for all forms of advertising messages. For example, it has been used in the City of San Diego to advertise national and local products, goods and services, new products being introduced to the consuming public, to publicize the "City in motion" campaign of the City of San Diego, to communicate messages from candidates for municipal, state and national offices, including candidates for judicial office, to propose marriage, to seek employment, to encourage the use of seat belts, to denounce the United Nations, to seek support for

Prisoners of War and Missing in Action, to promote the United Crusade and a variety of other charitable and socially-related endeavors and to provide directions to the traveling public.

24. Outdoor advertising is customarily purchased on the basis of a presentation or campaign requiring multiple exposure. Usually a large number of signs in a variety of locations are utilized to communicate a particular advertiser's message. An advertiser will generally purchase a "showing" which would involve the utilization of a specific number of signs advertising the same message in a variety of locations throughout a metropolitan area. Each separate sign provides exposure of various portions of the populace and each sign thereby forms an integral part of an interdependent whole. As a result, each sign in addition to producing income in and of itself, lends value to the entire system. Therefore, each sign has a value substantially more as a part of the system than it does separately. The value of each sign as a part of an overall system is not readily susceptible to precise measurement.

25. Outdoor advertising is presented in two basic standardized forms. A "poster panel" is a 12-foot by 24-foot sign on which a pre-printed message is posted, in sheets. A "painted bulletin" is generally a 14-foot by 48-foot sign which contains a hand painted message. The message will remain in one place for a period of time, usually a month, and will then be disassembled and replaced by another message while the first message is moved to another sign. In this way, the same hand painted message will be moved throughout a metropolitan area over a six-month or twelve-month period.

26. Plaintiffs' outdoor advertising displays produce substantial gross annual income.

27. Plaintiffs' outdoor advertising displays produce income to a variety of segments of the national, state and local economy and stimulate the flow of trade and commerce. Land owners and advertising agencies receive income from outdoor advertising.

28. Outdoor advertising increases the sales of products and produces numerous direct and indirect benefits to the public. Valuable commercial, political and social information is communicated to the public through the use of outdoor advertising. Many businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive.

29. Enforcement of Ordinance No. 10795, in addition to eliminating outdoor advertising within the City of San Diego, will adversely affect plaintiffs' businesses outside the City of San Diego in that many national or state-wide advertisers will be inclined to select other media capable of communicating with a wider segment of the consuming public, including San Diego, rather than selecting outdoor advertising which would be unable to communicate with the citizens of San Diego.

30. Plaintiffs and their predecessors have engaged in outdoor advertising in the City of San Diego for more than 60 years.

31. Many of the plaintiffs' signs are within 660 feet and others are within 500 feet of Interstate or Federal Aid

Primary highways and are designed to be viewed therefrom.

32. Enforcement of Ordinance No. 10795 will prevent plaintiffs from engaging in the outdoor advertising business in the City of San Diego and will cause plaintiffs to suffer substantial monetary losses.

33. Plaintiffs have entered into contracts to display messages on their respective signs in the City of San Diego; said contracts extending for various periods of time.

34. "The amortization provisions" of Ordinance No. 10795 have no reasonable relationship to the fair market value, useful life or income generated by the signs and were not designed to have such a relationship.

Dated: November 21, 1974

GIBSON, DUNN & CRUTCHER
THEODORE B. OLSON

and

HILLYER & IRWIN
OSCAR F. IRWIN

By /s/ THEODORE B. OLSON
Theodore B. Olson

Attorneys for Plaintiff
Metromedia, Inc.

Joint Stipulation of Facts

SNELL & WILMER
JOHN J. BOUMA
GUY GELBRON

and

HIGGS, FLETCHER & MACK
JOE N. TURNER

By /s/ JOHN J. BOUMA
John J. Bouma

Attorneys for Plaintiff
Pacific Outdoor
Advertising Co., Inc.

JOHN W. WITT
City Attorney
C. ALAN SUMPTION
Deputy City Attorney

By /s/ C. ALAN SUMPTION
C. Alan Sumption

Attorneys for Defendant
City of San Diego

[Introductory listing of counsel omitted in printing]

Plaintiffs' Joint Motion for Summary Judgment
Filed December 6, 1974

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

METROMEDIA, INC., a corporation, doing business as FOSTER AND KLEISER,

Plaintiff,

v.

CITY OF SAN DIEGO, a municipal corporation, and DOES I through XX, inclusive,

Defendants.

No. 332881
JOINT MOTION BY
PLAINTIFFS FOR
SUMMARY JUDGMENT

PACIFIC OUTDOOR ADVERTISING CO., INC., an Arizona corporation,

Plaintiff,

v.

THE CITY OF SAN DIEGO, a municipal corporation, THE CITY COUNCIL OF SAN DIEGO, VOYD BEIGHTS, Zoning Administrator of the City of San Diego and DOES 1 through 10, inclusive,

Defendants.

No. 333292

(Consolidated)

Plaintiffs' Joint Motion for Summary Judgment

TO THE DEFENDANT CITY OF SAN DIEGO AND ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on February 28, 1975, 1:30 p.m. in Department 11 of the above-captioned Court located at 220 West Broadway, San Diego, California, plaintiffs PACIFIC OUTDOOR ADVERTISING CO., INC. and METROMEDIA, INC. will move the Court for an Order of Summary Judgment in this action in their favor as to each and every issue involved in this action or as to any of said issues. Said motion will be made pursuant to the provisions of Section 437c of the California Code of Civil Procedure.

The foregoing motion will be made and based upon this notice, upon the pleadings, records and files in this action, the Joint Stipulation of Facts filed herein, the Plaintiffs' Joint Memorandum of Points and Authorities filed concurrently herewith and such other and further materials which may be presented by the plaintiffs at or prior to the hearing on said motion.

DATED: November 21, 1974.

GIBSON, DUNN & CRUTCHER
THEODORE B. OLSON

and

HILLYER & IRWIN
OSCAR F. IRWIN

By /s/ THEODORE B. OLSON
Theodore B. Olson

Attorneys for Plaintiff
Metromedia, Inc.

Plaintiffs' Joint Motion for Summary Judgment

SNELL & WILMER
JOHN J. BOUMA
GUY GELBRON

and

HIGGS, FLETCHER & MACK
JOE N. TURNER

By /s/ JOHN J. BOUMA
John J. Bouma
Attorneys for Plaintiff
Pacific Outdoor
Advertising Co., Inc.

[Introductory listing of counsel omitted in printing]

Defendant's Notice of Motion and Motion for Summary Judgment Filed December 6, 1974

SUPERIOR COURT
OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

No. 332881

METROMEDIA, INC., a corporation, doing business as FOSTER AND KLEISER,

Plaintiff,

v.

CITY OF SAN DIEGO, a municipal corporation, and DOES I through XX, inclusive,

Defendants.

JOHN W. WITT,
City Attorney

C. ALAN SUMPTION,
Deputy

City Administration Building
202 C Street
San Diego, California 92101
Telephone: 236-6220

Attorneys for Defendant.

Defendant's Motion for Summary Judgment

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT BY DEFENDANT OR FOR ORDER SPECIFYING ISSUES WITHOUT SUBSTANTIAL CONTROVERSY; POINTS AND AUTHORITIES AND SUPPORTING DECLARATIONS.

To plaintiff, Metromedia, Inc., and its attorneys of record:

PLEASE TAKE NOTICE that on Friday, February 28, 1975, at 1:30 p.m., or as soon thereafter as the matter can be heard, at the Courtroom of Department Eleven, at 220 West Broadway, San Diego, California 92101, defendant City of San Diego will move the court for entry of summary judgment in favor of defendant and against plaintiff, as prayed for in the answer.

This motion is made on the ground that there is no triable issue of material fact and the action has no merit, in that the subject ordinance constitutes a valid exercise of the police power and is not unconstitutional on its face or as applied.

This motion is based on this notice, the pleadings and records and files in this action, and on the supporting memorandum of points and authorities and declarations, and on matters subject to judicial notice. A summary of evidentiary matters relied upon, including those matters to be judicially noticed, is contained in the attached memorandum of points and authorities beginning at page 9.

Dated: December 5, 1974

JOHN W. WITT, City Attorney

By /s/ C. ALAN SUMPTION
C. Alan Sumption, Deputy
Attorneys for Defendant
City of San Diego

Excerpts from Reporter's Transcript of Proceedings, February 28, 1975

SUPERIOR COURT
OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

DEPT. 11 HON. JACK R. LEVITT, JUDGE

No. 332881

METROMEDIA, INC., a corporation, doing business as FOSTER AND KLEISER,

Plaintiff,

v.

CITY OF SAN DIEGO, a municipal corporation, and DOES I through XX, inclusive,

Defendants.

No. 333292

PACIFIC OUTDOOR ADVERTISING CO., INC., an Arizona corporation,

Plaintiff,

v.

THE CITY OF SAN DIEGO, a municipal corporation, THE CITY COUNCIL OF SAN DIEGO, BOYD BEIGHTS, Zoning Administrator of the City of San Diego and DOES 1 through 10, inclusive,

Defendants.

Excerpts from Reporter's Transcript, February 28, 1975

Reporter's Transcript

Friday, February 28, 1975

APPEARANCES:

Attorneys for Plaintiff

METROMEDIA, INC.:
GIBSON, DUNN & CRUTCHER
By: Theodore B. Olson
and
HILLYER & IRWIN
By: Oscar F. Irwin

Attorneys for Plaintiff

PACIFIC OUTDOOR ADVERTISING CO., INC.:
SNELL & WILMER
By: John J. Bouma, Guy Gelbron
and
HIGGS, FLETCHER & MACK
By: Joe N. Turner

Attorneys for Defendant

CITY OF SAN DIEGO:

JOHN W. WITT, City Attorney
C. ALAN SUMPTION, Deputy

JEAN A. YARNELL, CSR
Official Reporter
Superior Court

[1] *San Diego California, Friday, February 28, 1975; 1:30 p.m.*

* * * * *

Excerpts from Reporter's Transcript, February 28, 1975

[16] • • •

THE COURT: Again, I don't wish to interrupt your thought processes, but I am still not satisfied as to your position on the point I'm raising, and that is how do I know in this comparative process that as a matter of law the comparison is as you suggest? I mean, you believe it and you strongly urge it, but the Court has to weigh the factors, and if that's a litigable issue of fact, then the Court cannot grant the summary judgment motion, so explain to me why that's not a triable issue of fact. That's all I am asking.

MR. GELBRON: Yes, sir, your Honor. I think that it would not be a misstatement to state that if you want it to control confusing and excessive signs, you could do it by regulation as well as prohibition, but also by regulation by passing an ordinance as stated, all excessive and confusing signs are eliminated and must be removed. As a matter of law, the California Supreme Court has stated that the law does not tolerate the prohibition of something which may be regulated in such a way as to overcome any evils which may be incidentally connected with it. The same principle has been asserted and advanced by the California Supreme Court in Varney & Green vs. Williams, and the opinion, which goes through an analysis of what disadvantages and certain aspects of billboards which should be regulated, are not regulated in the ordinance which the [17] Court was dealing with in Varney & Green which is almost identical to the one here except the private loss is tremendously more, concluded after notifying that it wasn't a regulatory ordinance, stated as follows: As a matter of law, the ordinance in question doesn't attempt such regulation but undertakes to absolutely forbid direction or maintenance of any billboard or advertising purposes.

We have no doubt that this sweeping prohibition was beyond the power of the town trustees. In our memoranda,

we have cited other cases, over ten easy, where the courts in other jurisdictions have also noted that if it can be regulated, that is the proper way of exercising the police power. No one is concerned how the exercise of an eminent domain action takes place because the owner is compensated pursuant to the constitution, but is the method by which the municipality exercises the police power that is controlled, and the control there is that the means must not be arbitrary and oppressive, and here they are.

We have been talking only about one stated purpose of the ordinance, and if I could just proceed for one minute to the other ones, I will attempt to indicate to the Court the position that the plaintiffs have taken on this balancing test, and this is again we're running to the second contention under the due process that it is unreasonable because the private loss does outweigh the public gain.

Items such as, for example, travel safety—[18] hazardous. It's been indicated in discovery that it was admitted by the City that there is no record in the long history of the City and the automobile of any accident being caused by signs, by outdoor advertising structures. If there's a gain here, your Honor—

THE COURT: Now, is that really the thrust of the evidence from the interrogatories, or is it that the person who is deposed had no knowledge of such?

MR. OLSON: That was in an answer to the interrogatories. The City stated that they had no identity of any person who had been injured. Am I correct, Mr. Sumption?

MR. SUMPTION: Yes, your Honor, a correct statement of the City's position. In answer to the plaintiffs' interrogatories, we stated in effect, that the City was unaware and had no knowledge of any particular person or any particu-

lar instance, fact situation, of someone being injured in an automobile accident because of an outdoor advertising sign.

• • • • •

[54] • • •

THE COURT: Mr. Sumption, would that same argument be directed to the free speech aspect of the plaintiffs' contention? In other words, they point out that the state, by virtue of the code, has provided specifics. The sign has too many flashing lights or it's too close to the highway or whatever. Those specifics are regulatory that are reasonable, and yet do not interfere with first amendment rights. What is your response to that? In other words, they're saying, here you're prohibiting all off-site signs.

MR. SUMPTION: Yes, your Honor, which they argue is a means of communication being totally abolished. The City's position is that these signs are so detrimental to the public safety and welfare by their noxious effects that the police power outweighs what minimal free speech first amendment rights are involved. There are other means to communicate. If this was the only way to communicate, then I would say that the Court would have to rule that a total prohibition is going too far afoul of the first amendment, but there are other means to communicate. It's not as [55] though it's eliminating communication. This is a specialized means of communication involving primarily commercial type activity, and the courts have drawn a distinction between protection of commercial activity in connection with the first amendment and such as public information or in the political arena.

Plaintiffs raised this, and the City has had to concede because it's true, or we believe it's true that they do use, on occasion, political advertisements on their signs and public

service messages such as "buckle your seat belt" or give to a charitable organization, but—

THE COURT: I don't know that their contention is this, but I suppose a legitimate question would be, why could the ordinance not have been drawn to eliminate off-site signs that are of a commercial nature as distinguished from one which—from signs which allow free speech?

MR. SUMPTION: The plaintiffs, in fact, have suggested a number of things along these lines, your Honor, and from a theoretical standpoint, that sounds nice, but in practice, in trying to do that, they've got structures located on pieces of property in the stipulation of facts—in their argument, they point out the normal custom and practice of selling advertising on a—I don't know the exact terminology whether it's the term, but it's a situation of exposure to as many people in the city especially when it involved a national type product so that it can be seen [56] at various places by as many people in the city as possible.

I think as soon as you start saying they can only use them for political purposes, I don't think that they can continue their business by putting up political signs. There are only so many elections and so many candidates by having these signs up all over all the time.

THE COURT: But the ordinance is not concerned about whether they can maintain their business.

MR. SUMPTION: No, it's directed at land use which in this case happens to be using property or land for outdoor advertising purposes, but as soon as you—

THE COURT: Then your argument really is that the purpose and intent of the ordinance outweighs the necessity for free speech by virtue of that media. Is that your position?

MR. SUMPTION: That, in essence, is I think the City's position, your Honor.

* * * * *

No. 80-195

FILED
SEP 10 1980
MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

October Term, 1980

METROMEDIA, INC., et al.,

Appellants,

v.

CITY OF SAN DIEGO, et al.,

Appellees.

On Appeal From The Supreme Court Of California

MOTION TO DISMISS APPEAL

C. ALAN SUMPTION
Deputy City Attorney

JOHN W. WITT, City Attorney
Litigation Division
233 "A" Street, Suite 300
San Diego, California 92101
Telephone: (714) 236-7221

Counsel for Appellees

September 1980

INTERIM PRINTING & MAILING COMPANY
1105 WEST MORENA BOULEVARD, SAN DIEGO, CALIFORNIA 92110 — 275-3050

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MOTION TO DISMISS

Appellees move that that appeal herein taken be dismissed on the grounds that the appeal does not present a substantial federal question and that the decision below is obviously correct.

STATEMENT OF THE CASE

On March 14, 1972, the City Council of The City of San Diego adopted Ordinance No. 10795 (New Series) (Appellants' Appendix G), an ordinance prohibiting and abating, with enumerated exceptions, all off-site outdoor advertising display signs in the City of San Diego except for certain circumstances specified in subsection G of the ordinance. (Appellants' Appendix G 112a-113a.)

The types of signs excepted from the prohibition of the ordinance, in addition to various governmental, historical, religious, time and temperature, for sale, rent or lease, and signs being manufactured, include: bus bench signs, signs within malls, courts, arcades, etc., not visible from the boundary of the premises, signs on public transportation vehicles, signs on vehicles and trailers, temporary subdivision directional signs, and temporary political campaign signs. (Appellants' Appendix G 111a-112a.)

Ordinance No. 10795 (New Series) is contained in Chapter X ("Planning and Zoning") of the San Diego Municipal Code and recites as its purpose: to eliminate excessive and confusing signs

not related to the premises on which they are located; to eliminate hazards to pedestrians and motorists; to ensure signs are used as identification and not advertisement; to preserve and protect the appearance of the city; to protect the tourist industry by preventing the destruction of the natural beauty and environment of the city; to safeguard and enhance property values; and to protect public and private investment in buildings and open spaces. (Appellants' Appendix G 106a-107a.)

Appellants (hereinafter collectively referred to as "Metromedia") filed actions challenging the validity of the ordinance in the Superior Court against appellees (hereinafter collectively referred to as "City") soon after it was enacted.

The actions were consolidated and each side brought a motion for summary judgment against the other. In addition to a stipulation of facts, the City's motion was also based upon Metromedia's answers to interrogatories, matters subject to judicial notice and declarations pursuant to California law. (Clerk's Transcript, pp. 766-776, 1017-1024.)

The Superior Court denied City's motion for summary judgment and granted Metromedia's, declaring the ordinance invalid and enjoining City from enforcing it.

The California Supreme Court reversed the judgment of the trial court and upheld the ordinance as a proper application of municipal authority over zoning and land use for the purpose of promoting the public safety and welfare.

As to the traffic safety objectives sought to be achieved by the ordinance, the California Supreme Court stated: "We hold as a matter of law that an ordinance which eliminates billboards

designed to be viewed from streets and highways reasonably relates to traffic safety." (Appellants' Appendix A 7a.)

The decision below also rejected Metromedia's First Amendment attack on the ordinance as well as other asserted illegalities, but agreed with Metromedia in holding that the ordinance is partially preempted by state law as relates to removal of certain billboards with compensation.[1]

Because the ordinance does not define the term "outdoor advertising display signs" the decision below adopted a narrow construction of the signs proscribed by it by relying on a definition found in the California Revenue and Taxation Code as follows:

> . . . a rigidly assembled sign, display, or device permanently affixed to the ground or permanently attached to a building or other inherently permanent structure constituting, or used for the display of, a commercial or other advertisement to the public.
>
> Cal. Rev. & Tax. Code, § 18090.2.

---

[1] City has filed a conditional petition for writ of certiorari to review this portion of the decision below which was based on provisions of a federal statute (23 U.S.C. § 131).

ARGUMENT

I

PRELIMINARY STATEMENT

When Medtromedia states that the subject ordinance prohibits all outdoor advertising within the City of San Diego it must be understood that such a statement is only accurate to the extent that "outdoor advertising" is intended to be limited to a particular type of off-site sign.

This is important because the term "outdoor advertising sign" is commonly used to denote a much broader category of signs.[2]

As stated above, the ordinance excludes many types of outdoor advertising signs from its prohibition.

Metromedia is incorrect in stating that Joint Stipulation of Facts No. 28 conclusively determines that adequate alternative means of expression are not available for many. That stipulation does not state that *all* other forms of advertising, including the exceptions enumerated by the ordinance, are unavailable or insufficient, inappropriate or prohibitively expensive.

Furthermore, subsequent to the parties entering into the stipulation of facts, the ordinance was amended to add the significant exception of temporary political campaign signs,

---

[2] For example, under the California Outdoor Advertising Act it could include on-site signs. Cal. Bus. & Prof. Code, §§ 5226, 5202, 5203, 5221 and 5405.

thereby increasing the types of signs allowed. (Appellants' Appendix A 3a, n. 1.)[3]

Contrary to Metromedia's assertion, the record does not support the absence of any relationship between billboards and traffic safety.

Metromedia cites portions of the record relating to an answer to an interrogatory propounded by it to the City. The interrogatory asked for the names of every person known to the City who has suffered any physical injury as a result of the maintenance by Metromedia of signs in San Diego. City answered this interrogatory "unknown".

Metromedia conveniently ignores the subsequent subpart of the interrogatory which asked for the names of persons having any information which supports a contention that there is a causal relationship and the City's response giving names of such persons.

Obviously, the fact that San Diego was unaware at the time of answering an interrogatory of names of persons injured as a result of signs does not constitute "compelling evidence" of the absence of such a relationship.

---

[3] While Metromedia attempts to rely on evidentiary matters outside of the record (Jurisdictional Statement, p. 18, footnote) to support its contention that alternative means of communication are more expensive, it is interesting to note that no costs are cited for many of the alternatives allowed by the ordinance, *e.g.*, bus bench signs, vehicle signs, leafleting, etc.

Metromedia also improperly argues that a temporary political campaign sign would cost $2,500 to $25,000, apparently relying on the stipulated figures for its signs, without any support in the record that a temporary sign would cost that much.

Furthermore, Metromedia conceded in answer to City's interrogatories that its signs are designed to, and do in fact attract the attention of motorists on public streets and highways. (Clerk's Transcript, pp. 145-146, 488-489.)

II

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

A. The Ordinance Does Not Violate The First Amendment

As stated by the decision below, the case of *Suffolk Outdoor Advertising Co. v. Hulse,* 43 N.Y.2d 483, 373 N.E.2d 263 (1977) upheld a community-wide ban on off-site billboards and this Court dismissed the appeal there for want of a substantial federal question. (439 U.S. 808.)

Metromedia apparently finds as a basis of distinguishing that case the size and nature of the cities involved. Metromedia must hold the belief that the First Amendment protection varies in proportion with the physical size or population of a city--a proposition for which no authority exists for obvious reasons.

Several other sign cases raising First Amendment issues have been dismissed on appeal by this Court for want of a substantial federal question. *Newman Signs, Inc. v. Hjelle,* 268 N.W.2d 741 (1978), 440 U.S. 901 (1979); *State of Washington v. Lotze,* 593 P.2d 811 (1979), 44 U.S. 921 (1979); *Stuckey's Stores, Inc. v. O'Cheskey,* 600 P.2d 258 (1979), ____ U.S. ____ (1980), 64 L.Ed.2d 783; *Veterans of Foreign Wars, Post 4264 v. City of Steamboat Springs,* 575 P.2d 835 (1978), 439 U.S. 809 (1978); *Modjeska Sign Studios v. Berle,* 373 N.E.2d 255 (1977), 439 U.S. 809 (1978).

Although some of these cases may be factually distinguishable, in that the ordinances are not identical to the ordinance here, they are based upon the same First Amendment analysis as in the decision below. They have held that such restrictions are valid time, place and manner of speech regulations because not based on the content of speech; they serve a significant governmental interest (traffic safety and aesthetics); they do not completely prevent dissemination by alternative means. Many of the cases cite the intrusive nature of billboards in their First Amendment analysis and the analysis is applied without distinction between commercial and political messages.[4]

This Court's decision in *Erznoznik v. City of Jacksonville,* 422 U.S. 205 (1975) does not refute the conclusion of the decision below, as well as that of other decisions that billboards are intrusive. The infirmity of the Jacksonville ordinance was that it was based on the *content* of films being shown at drive-in movies. This Court noted in *Erznoznik* that the drive-in movie theater was not trying to reach unwilling viewers and will presumedly be shielded where feasible from nonpaying customers.

Billboards, of course, are designed to catch the attention of motorists on the streets.

Nor is the recent case of *Central Hudson Gas & Electric Co. v. Public Service Commission,* 48 U.S.L.W. 4783 (June 20, 1980) inconsistent with the decision below. The regulation involved in *Central Hudson* was based on the particular content

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[4] Cases raising the issue of non-commercial speech are *State of Washington v. Lotze, supra,* and *Suffolk Outdoor Advertising Co. v. Hulse, supra.*

of information and prohibited its dissemination entirely. The analysis there is not applicable in the case at bench which is a time, place and manner regulation as opposed to a direct restriction of speech.

If anything, the *Central Hudson* case represents a lessening of the First Amendment's protection when applied to commercial speech by allowing the suppression of information when the four part test enunciated there can be met. (See Mr. Justice Blackman's concurring opinion.)

Metromedia argues that the ordinance discriminates based on content since it exempts on-site signs and others. There is nothing in the record to support a contention that certain signs are allowed because of content. Numerous bases in support of the exemptions were set forth in the briefs below in answer to Metromedia's argument that the ordinance violated equal protection of the laws. (See, *e.g.*, Appellants' Opening Brief, Court of Appeal, pp. 47-48.)

Nor have the cases agreed with the contention that a distinction between on-site and off-site signs violates the First Amendment because based on content. *State of Washington v. Lotze, supra*, 503 P.2d 811, appeal dismissed, 444 U.S. 921 (1979).[5]

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[5] See also *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 68 (1976), citing *Markham Advertising Co. v. State*, 73 Wash.2d 405, 439 P.2d 248 (1968) in note 30.

B. The Ordinance Is A Proper Exercise Of The Police Power

It is clear that an exercise of the police power may restrict the manner of engaging in a business as well as prohibit it altogether. *Nebbia v. New York,* 291 U.S. 502 (1933); *Goldblat v. Town of Hempstead,* 369 U.S. 590 (1962); *Consolidated Rock Products Co. v. City of Los Angeles,* 57 Cal.2d 515 (1962), dismissed, 371 U.S. 36 (1962).

Under the decision below, Metromedia may attack the amortization schedule as applied to any particular sign. (Appellants' Appendix A 44a, 47a.)

Metromedia is not prohibited from engaging in outdoor advertising in a form not prohibited by the ordinance.

CONCLUSION

City respectfully submits that there is no substantial federal question presented by this appeal and that the decision below is obviously correct. The appeal should therefore be dismissed.

Dated: September 9, 1980

Respectfully submitted,

JOHN W. WITT, City Attorney

By: C. ALAN SUMPTION
Deputy City Attorney

Attorneys for Appellees

No. 80-195

SEP 5 1980

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

METROMEDIA, INC., *Appellant,*

v.

CITY OF SAN DIEGO, a municipal corporation, and DOES I through XX, inclusive, *Appellees.*

PACIFIC OUTDOOR ADVERTISING CO., INC., *Appellant,*

v.

THE CITY OF SAN DIEGO, a municipal corporation, THE CITY COUNCIL OF SAN DIEGO, VOYD BEIGHTS, Zoning Administrator of the City of San Diego and DOES 1 through 10, inclusive, *Appellees.*

On Appeal From The Supreme Court Of California

BRIEF OF THE OUTDOOR ADVERTISING ASSOCIATION OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE JURISDICTIONAL STATEMENT.

ERIC M. RUBIN

WOLF, BLOCK, SCHORR AND SOLIS-COHEN
1100 Connecticut Avenue, Suite 920
Washington, D.C. 20036
(202) 861-0870

Attorneys for the Outdoor Advertising Association of America, Amicus Curiae

September 4, 1980

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

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On Appeal From The Supreme Court Of California

BRIEF OF THE OUTDOOR ADVERTISING ASSOCIATION OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE JURISDICTIONAL STATEMENT.

INTEREST OF AMICUS CURIAE

Pursuant to Rule 42, the Outdoor Advertising Association of America has secured the consent of all parties to this litigation to the filing of this brief as AMICUS CURIAE. See Appendix A. The brief supports the appeal of Metromedia, Inc. and Pacific Outdoor Advertising Co., Inc., appellants, and urges that the decision of the Supreme Court of the State of California upholding the validity of an ordinance of the City of San Diego be reversed.

The Outdoor Advertising Association of America (OAAA) is the trade association of the standardized outdoor advertising industry. The Association represents a majority of the outdoor advertising companies in the United States. OAAA members maintain 229,000 outdoor advertising signs in 7,900 distinct local geographical areas throughout the United States. Seven OAAA member-companies, including the two appellants, maintain operations within the State of California. The Association's members are predominantly small, locally based family-owned businesses which typically provide services to contiguous geographic areas within a particular state. Other members are much larger and operate on a regional or national basis. The broad diversity and geographic coverage of outdoor advertising is reflected in the listing of OAAA members and the location of their principal offices contained in Appendix B.

The outdoor advertising industry has an intense interest in this case. The central issue before the Court is whether a municipality may use its police power to totally suppress outdoor advertising. The California Supreme Court has held that the First, Fifth and Fourteenth Amendments do not restrain such an exercise of authority. Therefore, this appeal will directly determine the future of this medium.

The Court's disposition of this appeal will have an immediate impact on the continued existence of the outdoor medium in California. 17 counties and 209 cities within the state have already completely prohibited outdoor advertising. These localities are listed in a letter from the California Department of Transportation contained in Appendix C. Many of these ordinances preclude billboards from localities which are particularly scenic or principally residential in character without ap-

preciable commercial or industrial activity and have not been directly challenged. As the Department indicates, there is also substantial litigation presently pending in the California Courts challenging restrictions which would either limit, or totally eliminate outdoor advertising from commercial or industrial areas in many major cities or counties within the state. Legislation similar to the San Diego ordinance is also under consideration in other California municipalities. The Court's disposition of this appeal will directly determine the validity of all of these measures and thus will have a decisive impact on whether the outdoor medium will be suppressed within California.

The implications of this case are equally decisive with respect to the continued viability of outdoor advertising throughout the United States. Many localities now permit outdoor advertising within narrowly defined areas, principally in commercial and industrial zones. e.g. City of Raleigh, North Carolina, Ordinance No. 982TC95, 1979. Nevertheless, outdoor advertising is regularly subject to efforts at its suppression. A suit challenging a law which prohibits outdoor advertising throughout the State of Maine is currently under review by the Court of Appeals for the First Circuit. See *John Donnelly & Sons et al.* v. *Roger L. Mallar*, (Civil No. 77-28450, D. Maine, Dec. 28, 1977) *appeal docketed* No. 791575, (1st Cir. 1979). The Court's disposition of the instant appeal will determine the scope of future regulation of outdoor advertising nationwide and the vulnerability of the medium to moves for its elimination.

Finally, aside from the strictly legal considerations involved, this appeal will have decisive effect on the broad range of business decisions which will also determine the extent to which the outdoor advertising in-

dustry will remain a significant medium. Simply stated, a legal environment which countenances the total abolition of outdoor advertising without just compensation for the loss of investment inevitably will chill the industry's access to capital. Indeed, such circumstances would compel many outdoor advertising companies themselves to seriously question whether they can continue to justify the expenditures necessary to maintain and improve existing sign structures when measured against alternative investment opportunities.

The OAAA respectfully submits this brief in support of the Jurisdictional Statement in the present case in order to bring to the Court's attention the views and arguments of the outdoor industry and to impress upon the Court the crucial importance of granting a full hearing in this matter.

ARGUMENT

I The Questions Raised By This Appeal Are Substantial And Require Full Review By The Court

This appeal warrants the Court's full review because it raises the crucial question of whether a major medium of communication can be wholly eliminated through police power regulation. The California Supreme Court has held that the Constitution imposes virtually no restraints against such actions and has sustained San Diego's complete prohibition of outdoor advertising. That decision conflicts sharply with a long line of decisions by this Court which reject the elimination of a distinct medium of communication. If the holding of the Court below is permitted to stand, the continued role of outdoor advertising as a major medium for the dissemination of protected expression is severely threatened.

The case is also compelling because it brings into focus the intrinsic importance under the First Amendment of each distinct medium of communication. The parties in this action have stipulated that "many businesses, politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive." (A.125a-26a, J.S. 22, 23, 28)[1] Nevertheless, the Court below has held as a matter of law that media are fungible and that the mere existence of other modes of expression is sufficient to justify the suppression of a particular medium. Therefore, this case raises squarely the question of whether the complete prohibition of a particular medium is valid if other channels of expression are available.

This appeal also raises questions as to whether a medium which carries a broad spectrum of information may be properly characterized as a commercial medium for purposes of First Amendment analysis where a substantial portion of its content is not commercial in nature.

A full review of this appeal by the Court is crucial. The Court's summary dismissal of an earlier case, *Suffolk Outdoor Advertising Co.* v. *Hulse, 43 N.Y.2d 483, 373 N.E.2d 263, 402 N.Y.S.2d 368 (1977), app. dismissed*, 439 U.S. 808 (1978), involving an absolute ban on outdoor advertising has been viewed as controlling precedent by the court below as well as in recent decisions by other courts. See *Ackerley Communications, Inc.* v. *City of Seattle* 92 Wash.2d 905, 602 P.2d 1177 (1979). The Court has indicated that its summary dispositions of appeals have limited precedential value.

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[1] References to "A.____" are to appropriate pages of the Appendix to the Jurisdictional Statement; References to "J.S.____" are to the paragraph number of The Joint Stipulation of Facts set forth therein.

But the fact is that full review of this appeal is crucial in order to avert further retrogression in the lower courts of the protections accorded by the First and Fourteenth Amendments to each medium of communications. This appeal provides the Court with a uniquely suitable vehicle for clarifying the law in this regard because the extensive stipulations by the parties bring the legal issues into focus in a particularly undiluted fashion.

II Outdoor Advertising Is A Major Medium Of Communications With Unique Characteristics Which Expand The Opportunities For Protected Expression Beyond Those Provided By Other Media.

Outdoor advertising has been a principal means for the public dissemination of commercial and noncommercial information in the United States since the inception of this country. *See*, DAVIDSON, PROPAGANDA AND THE AMERICAN REVOLUTION (Univ. of No. Carolina Press 1941); GALLO, THE POSTER IN HISTORY (American Heritage Pub. Co. 1972) HOUCK, OUTDOOR ADVERTISING: HISTORY AND REGULATIONS, (Univ. of Notre Dame Press 1969), Chap. 2. The outdoor medium has remained a primary channel for communication despite strong competitive pressure from other media. The reasons that outdoor advertising has retained its significance have a direct bearing on this case.

The other principal communications media including television, radio, direct mail, newspapers and magazines are classified as "in-home" media because they reach their audience in the privacy of the home or workplace. By contrast, outdoor advertising is classified as an "out-of-home" medium because it is predicated on the dissemination of information in a public forum.

Advertising Age, "Out-of-Home Media Supplement," March 10, 1980. This inherent public character is the key to the continued significance of outdoor advertising.

Because it is predicated on public exposure, outdoor advertising quantitatively *expands* the spectrum of opportunities for the dissemination of information beyond those afforded by in-home media. As a result, outdoor advertising is often used in conjunction with other media to extend the potential for exposure of a particular message. Moreover, outdoor advertising often supplants the in-home media because of the broad exposure which can be achieved through public dissemination. Although other media such as transit posters and leaflets are also based on public dissemination, outdoor advertising is generally regarded today as the primary out-of-home media because of its greater potential for exposure and capacity to communicate effectively. *Advertising Age, Id.*

The public character of outdoor advertising also permits the dissemination of information at considerably lower cost than high impact in-home media. The fact that the outdoor medium utilizes a public forum permits broad audience exposure with very few signs. This contrasts sharply with the high costs required by in-home media which essentially communicate on an individualized basis. MEDIA MARKET GUIDE, 233 (Summer 1978). As a result, outdoor advertising is used by a broad spectrum of advertisers including businesses and diverse interests like those which sponsored the particularized messages contained in Appendix I to the Jurisdictional Statement. As the parties have stipulated, if outdoor advertising was completely supressed many of these persons would be prevented from achieving meaningful dissemination to the public since other media are

wholly unsuitable, or prohibitively expensive. (A.125a-26a, J.S. 28)

Outdoor advertising has retained its significance because like every other medium, it has certain distinct capabilities and characteristics which make it unique. For example, the fixed written and pictorial copy on a billboard is evocative in a different manner than the communication achieved through the broadcast media. A political advertisement on radio must be structured differently in order to have the same impact as written outdoor copy. The simple declaratory statement "Vote for Democrats" would command little attention when disseminated by radio because the auditory experience is essentially transitory. But the same message would be fully absorbed if it appeared on a billboard. Indeed, there are differences between print media. This simple written statement would have a different impact commingled with other copy in a newspaper than it would standing alone on a billboard. See, SCHWARTZ, THE RESPONSIVE CHORD, (Doubleday 1974). By the same token, each medium has certain limitations. A billboard would have little value for disseminating a complex explanation of a particular plank in the 1980 Republican platform. Direct mail would be a far more appropriate medium for such information.

Outdoor advertising has remained a major medium despite the sharp reduction in locations where billboards can be sited due to governmental regulation.[2] These pressures have forced the evolution of an operating format which yields high impact with relatively few signs. The industry has standardized billboards in two basic

[2] The General Accounting Office has reported that the Federal Highway Beautification Act has alone caused the removal of 440,000 outdoor advertising signs as of March 31, 1977. *GAO Report To Congress*, March 27, 1978.

sizes. They are a 12'x25' poster panel which uses mass printed copy, and a 14'x48' bulletin which usually is custom painted for each message. A sophisticated statistical analysis has also been developed which enables each outdoor advertising company to determine the size and demographic characteristics of the potential audience exposure for each of its signs. The potential for exposure is further maximized by rotating the same message between structures at different locations. The net result is that a message can be precisely targeted to a specific limited audience using only a few signs. Such exposure can be achieved on a local, regional, or national basis. The extraordinary efficiency of the medium is reflected by the fact that the 229,000 standardized billboards in the United States yield 109,912,667 adult exposure opportunities in any given day. Simmons Market Research Bureau, Inc. *The 1979 Study of Media and Markets — Outdoor Advertising.*

The fact is that outdoor advertising has remained viable because it is a unique medium and because the means for communication to the public remain essentially a scarce resource. The total suppression of outdoor advertising would necessarily constitute a qualitative and quantitative diminution of those limited resources for expression.

III A Total Prohibition of Outdoor Advertising Violates The First Amendment.

A. The Abolition Of The Outdoor Medium Is An Invalid Exercise Of The Police Power.

This Court's decisions regarding the invalidity of police power restraints on a means of communication reflect a careful effort to husband what are essentially limited channels for public expression. The Court has

consistently rejected measures which would totally prohibit a medium for the dissemination of protected speech. *Lovell* v. *City of Griffin, Georgia,* 303 U.S. 444, 452 (1938) (invalidating ban on distribution of circulars, handbooks, advertising or literature of any kind); *Schneider* v. *New Jersey,* 308 U.S. 147 (1939) (handbills); *Martin* v. *Struthers, Ohio,* 319 U.S. 141, 143 (1943) (door-to-door solicitation); *Saia* v. *People of New York,* 334 U.S. 558 (1948) (sound trucks); *Police Department of Chicago* v. *Mosley,* 408 U.S. 92 (1972) (picket signs); *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205 (1975) (exhibition of nudity at drive-in movie theaters). The Court has upheld less encompassing controls only where the government can show that the measure is the least restrictive means of serving a compelling interest. Cf. *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765 (1978); *Buckley* v. *Valeo,* 424 U.S. 1, 25 (1976) (per curiam). The decision of the Court below conflicts directly with this clear precedent.

The California Supreme Court seeks to rationalize San Diego's ban in part by attempting to distinquish billboards from the other media at issue in this Court's earlier decisions. The Court below asserts that "billboards are large immobile permanent structures and therefore different than other media such as leaflets, newspapers and the like," which are "more transitory or less obtrusive media." (A.24a) The California Court reasons that these factors remove outdoor advertising from the penumbra of the First Amendment and make its control subject solely to zoning considerations. This conclusion simply cannot withstand the force of the First Amendment.

Many of the decisions by this Court rejecting the validity of various bans on a medium of expression have

involved media which, like billboards are public in character. Like the San Diego measure, the enactments which established those prohibitions were predicated on a perception that the medium at issue was in some way bothersome or intrusive. Nevertheless, in each case, the Court made clear that the public character of the medium alone does not provide a rationale which completely negates First Amendment protections.

> "Any abuses which loud-speakers create can be controlled by narrowly drawn statutes. When a city allows an official to ban them in his uncontrolled discretion, it sanctions a device for suppression of free communication of ideas." *Saia* v. *New York, supra,* at 562.

Indeed, streets and highways, which provide the principal forum for outdoor advertising, have been given special protection for the dissemination of protected expression. E.g., *Hague* v. *CIO,* 307 U.S. 496, 515, 516 (1939); *Baldwin* v. *Redwood City,* 540 F2d 1360, 1368 (9th Cir. 1976); *Washington Mobilization Committee* v. *Cullinane,* 566 F2d 107, 119 (D.C. Cir. 1977); *North Shore Right to Life Committee* v. *Manhasset American Legion Post No. 304,* 452 F. Supp. 834, 838 (E.D.N.Y. 1978).

Implicit in the San Diego ordinance is a policy which subordinates First Amendment values to unsubstantiated considerations regarding traffic safety and aesthetics in commercial and industrial zones. The Courts have consistently held that these and other seemingly more compelling governmental purposes are insufficient to outweigh First Amendment considerations. *Erznoznick* v. *City of Jacksonville, supra.* Significant governmental interests that have been rejected in other cases include:

—Maintenance of stable, racially integrated housing ("For Sale" signs). *Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U.S. (1977);

—Protection of customers' health (drug price advertising). *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council,* 425 U.S. 748 (1976);

—Traffic safety (newspaper seller's license). *Wulp Corcoran,* 454 F.2d 826, 834 (1st Cir. 1972);

—Traffic safety (political signs), *Baldwin* v. *Redwood City,* 540 F.2d 1360, 1373 (9th Cir. 1976); *Gannett Co.* v. *Rochester,* 69 Misc. 2d 619, 330 N.Y.S. 2d 648 (1972) (newspaper vending machine.);

—Transit passenger safety and convenience (newspaper sales). *Wright* v. *Chief of Transit Police,* 558 F.2d 67, 68 (2d Cir. 1977);

—Preventing littering (handbills). *New York* v. *Remeny,* 40 N.Y.2d 527, 355 N.E.2d 375 (1976).

Amicus certainly would not contend that at some level of regulation considerations such as aesthetics and traffic safety provide the basis for the specific regulation of outdoor advertising. However, as is more fully discussed below, the San Diego ordinance is not bottomed on such a measured "least restrictive" approach. Instead, the city has adopted an undifferentiating policy which decimates an entire medium.

B. The San Diego ordinance cannot be sustained as an appropriate time, place and manner restriction on protected expression.

The California Court's decision further seeks to rationalize the San Diego ordinance as a proper time, place and manner restriction. *Virginia State Board of*

Pharmacy v. *Virginia Citizens Consumer Council, Inc., supra.* As the Jurisdictional Statement points out, the San Diego ordinance cannot be justified on that basis because alternative channels of expression are insufficient and the ordinance is not "content neutral" because it would permit signs carrying messages pertaining to commercial activities within the premises on which they are located while prohibiting the dissemination of other information. However, without regard to the substance of the San Diego ordinance, it must be emphasized that time, place and manner analysis does not provide a rationale for the total prohibition of an entire medium. This issue was firmly laid to rest by the Court in *Linmark Associates, Inc.* v. *Township of Willingboro, supra,* the central case relied upon by the Court below. There a local government sought to promote stable racially intergrated housing by banning on-premises "For Sale" signs. The Court responded to this closely analogous prohibition stating, "That the proscription (on "For Sale" signs) applies only to one mode of communication, therefore, does not transform this into a 'time, place or manner' case." *Id.* at 94.

Likewise, the Court has made it clear that the mere availability of alternative channels for expression does not turn a prohibitive statute into a valid time, place or manner restriction.

> Although in theory. sellers remain free to employ a number of different alternatives, in *practice realty is not marketed through leaflets, sound trucks, demonstrations or the like.* The options to which sellers realistically are relegated—primarily newspaper advertising and listing with real estate agents—*involve more costs* and less autonomy than "For Sale" signs; are *less likely to reach persons not deliberately seeking information; and may be*

> *less effective media for communicating the message* that is conveyed by a "For Sale" sign in front of the house to be sold. *The alternatives, then, are far from satisfactory.* (Citations omitted.) *Id.* at 93.

Contrary to the California Court's analysis, what is most certainly *not* meant by alternative channels is that there may be one or more other means of communicating the message. This Court has emphasized that speech may not be abridged because "the speaker's listeners could come by his message by some other means." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc., supra* at 757, n.5. Liberty of expression may not be curtailed on the basis that it may be exercised in some other place. *Schneider* v. *New Jersey, supra; Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 546, 556 (1975). Most recently the Court has stated.

> "Although a time, place, and manner restriction cannot be upheld without examination of alternative avenues of communication open to potential speakers . . . We have consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression. (Citations omitted) *Consolidated Edison Company of New York, Inc.* v. *Public Service Commission of New York,* _____U.S._____, 100 S. Ct. 2326, 2335 n. 10 (1980).

The facts of this case show that elimination of outdoor advertising in San Diego in real terms reduces the opportunities for the effective dissemination of protected expression. This negates any consideration of the City's ordinance as a reasonable time, place and manner restriction.

IV The San Diego Ordinance is not a Valid Restriction of Commercial Speech.

A. Outdoor advertising is not purely a commercial medium.

In its decision, the Court below treats outdoor advertising as a medium for commercial speech. It is true that a significant proportion of the information disseminated in outdoor advertising is commerical in the sense that it "relates solely to the economic interests of the speaker and its audience." *Central Hudson Gas and Electric Corporation* v. *Public Service Commission of New York*, _____U.S. _____, 100 S. Ct. 2343, 2349 (1980). But the stipulated record makes clear that a substantial component of outdoor advertising is political and social information and does not strictly relate to commercial interests. Therefore, the mixed commercial, political and social information disseminated through outdoor advertising in San Diego removes this case from consideration in terms of a purely commercial speech analysis.

B. The Prohibition of outdoor advertising cannot be justified under a commercial speech analysis.

The recent decisions of this Court firmly established that even a purely commercial medium may not be suppressed under the circumstances presented by this case—if, indeed, such a prohibition is ever valid. In its recent decision in *Central Hudson, supra,* the Court summarized a four-step analysis for determining whether a particular restriction on commercial speech is invalid under the First Amendment.

At the outset, we must determine whether the expression is protected by the First Amendment. For

> commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. *Id.* at 4785.

The San Diego ordinance does not survive scrutiny under this standard. The first two criteria are not at issue here. The record establishes that the billboards at issue in this case were lawfully erected under applicable law. There is no suggestion that the messages disseminated on the signs were unlawful, fraudulent, or misleading. However, San Diego's ordinance fails under the two remaining standards.

While the City may well have a general interest in aesthetics or traffic safety, the record in this case is completely devoid of any factual substantiation that the total elimination of billboards directly advances these interests. As emphasized in appellant's Jurisdictional Statement, any nexus between the San Diego ordinance and these policies is based wholly on supposition. There is no evidence in the record that outdoor advertising has been the cause of traffic accidents in San Diego. There is no explanation of how safety will be enhanced by singling out billboards from the myriad of other more pervasive urban distractions including the far greater number of on-premise signs. Likewise, based on the record, it is difficult to envision how the total elimination of billboards will have an appreciable impact on the aesthetics of the City of San Diego. The connection to aesthetics is particularly attenuated when it is recognized that the billboards at issue are already confined to the

commercial and industrial zones which comprise 2.8% of that City and that the ordinance does not attempt more comprehensive controls on the broad range of visual intrusions in those areas.

It strains credulity to think that San Diego's total prohibition is "no more extensive in scope than necessary to further the state's interest" in traffic safety or aesthetics. In *Central Hudson, supra*, the Court imposed a heavy burden on any restriction of commercial speech, requiring that the government must make an affirmative showing that a more limited restriction would not be adequate to protect the state's interest. "In the absence of a showing that more limited speech regulation would be ineffective, we cannot approve the complete suppression of Central Hudson's advertising." *Central Hudson* at 4787. The City has made no such demonstration, nor has it shown why lesser alternatives to complete suppression are inadequate. Such alternatives may be readily envisioned. The City could determine whether certain specific billboards actually pose a hazard to traffic and order their removal. In response to aesthetic concerns, an ordinance could set limitations on the spacing between billboards where there is a concrete reason to mitigate their impact. See *Young* v. *American Mini Theaters Inc.*, 427 U.S. 50 (1976). But the California Supreme Court's decision upholding San Diego's total, undiscerning suppression and its consequent impact on protected expression cannot be sustained on the basis of speculative and subjective notions of what might advance public policy.

CONCLUSION

The questions presented by this appeal are substantial. Probable jurisdiction should be noted and the case set down for argument.

Respectfully submitted,

ERIC M. RUBIN

WOLF, BLOCK, SCHORR AND SOLIS-COHEN
1100 Connecticut Avenue, Suite 920
Washington, D.C. 20036
(202) 861-0870

Attorney for Amicus Curiae

September 4, 1980

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APPENDIX A

CAHILL GORDON & REINDEL

EIGHTY PINE STREET
NEW YORK, N.Y. 10005

September 2, 1980

Re: *Metromedia, Inc.* v. *City of San Diego*

80-195

Dear Mr. Rubin:

This will confirm that, on behalf of appellants Metromedia, Inc. and Pacific Outdoor Advertising Co., Inc., we consent to the filing of a brief *amicus curiae* on behalf of the Outdoor Advertising Association of America in the above appeal.

Sincerely,

/s/ FLOYD ABRAMS

ERIC M. RUBIN, ESQ.
WOLF, BLOCK, SCHORR
AND SOLIS-COHEN
1100 Connecticut Avenue,
N.W.
Washington, D.C. 20036

WOLF, BLOCK, SCHORR AND SOLIS-COHEN
NINTH FLOOR
1100 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C. 20036

August 14, 1980

C. Alan Sumption
Deputy City Attorney
233 A Street
Suite 300
San Diego, California 92101

Dear Mr. Sumption:

I am counsel to the Outdoor Advertising Association of America. I am writing on behalf of the Association to request the consent of the City of San Diego to file a brief amicus curiae before the Supreme Court of the United States in *Metromedia, Inc. et al.* v. *The City of San Diego et al.* Because of the tight time constraints imposed by the Supreme Court on filing the amicus briefs, I would appreciate your prompt response to my request.

Sincerely,

/s/ ERIC M. RUBIN
For Wolf, Block, Schorr
and Solis-Cohen

EMR: cak

8/15/80 Consent granted. C-Alan Sumption

APPENDIX B

Membership Of The Outdoor Advertising Association Of America, Inc.

ABC Outdoor Advertising, Inc.
Pewaukee, WI

Ackerley Communications, Inc.
Seattle, WA

Acme Poster Advertising Co.
Natchitoches, LA

Action Outdoor Advertising
Bryan, TX

Adams Outdoor Advertising, Inc.
Yadkinville, NC

Alabama Outdoor Advertising Co.
Birmingham, AL

Alleghany Poster Advertising Co.
Terra Alta, WV

Allen Outdoor Advertising
Waco, TX

Allison Outdoor Advertising
Sylva, NC

Americus Poster Advertising Co.
Waynesboro, GA

Appalachian Poster Adv. Co., Inc.
Lenior, NC

Austin Poster Advertising Co.
Effingham, IL

B & B Outdoor Advertising
Shreveport, LA

Barrett Outdoor Communications
Milford, CT

Bay Poster Advertising Co.
Ashland, WI

Big Tex Outdoor Advertising, Inc.,
Brownwood, TX

Blocher Outdoor Adv. Co., Inc.
St. Cloud, MN

Bocook Outdoor Media, Inc.
Anderson, SC

Burkhart Advertising, Inc.
South Bend, IN

Buts Outdoor
Fond Du Lac, WI

C & U Poster Advertising Co.
Champaign, IL

Maurice Callahan & Sons
Pittsfield, MA

Cannon Advertising Co.
Murfreesboro, TN

Carlson Outdoor Advertising
Rock Island, IL

Carolina Displays, Inc.
Raleigh, NC

Central Advertising Co.
Lansing, MI

Central Georgia Advertising Co.
Waynesboro, GA

Charleston Advertising Co., Inc.
Charleston, SC

Colony Advertising, Inc.
Richmond, VA

Columbia Outdoor Advertising, Inc.
Columbia, SC

The Columbus Outdoor Adv. Co.
Columbus, OH

Crawford Advertising of Mississippi, Inc.
Gulfport, MS

Creative Displays, Inc.
Tuscaloosa, AL

Creel Outdoor Advertising
Florence, SC

Cunningham Advertising, Inc.
St. Bonifacius, MN

W.L. Denny Outdoor Advertising
Columbus, OH

Derby Outdoor Advertising
Rapid City, SD

The Derse Company
Milwaukee, WI

Dingeman Advertising, Inc.
Traverse City, MI

Display, Inc.
Waterloo, IA

Display Media
Baraboo, WI

John Donnelly & Sons
South Portland, ME

Donrey Outdoor Advertising Co.
Little Rock, AK

Dowie Outdoor, Inc.
Cedar Rapids, IA

Duplex Advertising Co.
Austin, TX

Estus Outdoor Advertising Co.
Savannah, GA

Fabian Advertising, Inc.
Herman, MN

Fendig Outdoor Advertising Co.
St. Simons Island, GA

Flynn Outdoor Advertising
Sioux City, IA

Flynn Outdoor Advertising
Sioux Falls, SD

Flynn Outdoor Advertising
Sheboygan, WI

Foster and Kleiser
Los Angeles, CA

Finney Outdoor Advertising Corp.
Fall River, MA

French Advertising
Fond Du Lac, WI

Gannett Outdoor Advertising Group
Phoenix, AZ

Georgia Outdoor Advertising, Inc.
Athens, GA

Ghaster Outdoor Advertising, Inc.
Lima, OH

Giddings Outdoor Advertising Service
Carrollton, KY

Green Bay Poster Advertising
Green Bay, WI

Griese Companies, Inc.
New Canaan, CT

H & V Advertising Co.
Rusk, TX

Hale Poster Advertising Co.
Iron Mountain, MI

Hansen Advertising Company, Inc.
Madison, WI

Frank Hardie Advertising, Inc.
Dubuque, IA

Harris Poster Advertising Co.
Griffin, GA

The Hathaway Advertising Co.
New Bedford, MA

Hausen Poster Advertising Co.
Fort Atkinson, WI

Hemmert Outdoor Advertising Co.
Sidney, OH

Heywood Company Outdoor Adv. of California
San Bernardino, CA

Holland Advertising Co.
Beaumont, TX

Hoosier Outdoor Advertising Corp.
Bloomington, IN

Illinois Poster Advertising Co.
Sterling, IL

Imperial Outdoor Advertising, Inc.
Lincoln, NE

Jackson Outdoor Advertising, Inc.
Michigan City, IN

Jackson Poster Advertising System
Charlottesville, VA

Johnstown Poster Advertising Co.
Johnstown, PA

Kanawha Valley Advertising Co.
Charleston, WV

Keleher Outdoor Advertising
Bartlesville, OK

Kenosha Advertising Co.
Kenosha, WI

Key Outdoor, Inc.
Kankakee, IL

Krain Outdoor Advertising
Cheltenham, PA

The Lamar Corporation
Baton Rouge, LA

Lamar Outdoor Advertising, Inc.
Jackson, MS

Jules Lauve, Jr., Inc.
Galveston, TX

Louisiana Sign Company, Inc.
Sulphur, LA

M & C Company
Eagle Grove, IA

McWhorter Advertising Corp.
Bridgeport, WV

Major Media, Inc.
Eden Prairie, MN

Marden Advertising Co.
Duncan, OK

Martin Communications, Inc.
Los Angeles, CA

Mathey-Strong, Inc. Outdoor Advertising
Peoria, IL

The R.C. Maxwell Company
Trenton, NJ

Miller Outdoor Advertising, Inc.
Laurens, SC

Missouri Valley Poster Advertising Co.
Falls City, NE

Modjeska Sign Studios, Inc.
Kingston, NY

Morgan Signs, Inc.
State College, PA

Moynihan Outdoor Advertising, Inc.
Princeton, IL

Murphy Advertising Co.
Waterbury, CT

Murphy Incorporated
Bridgeport, CT

Myhre Advertising
Great Falls, MT

Naegele Outdoor Advertising Co. of the Twin Cities, Inc.
Minneapolis, MN

Nauman Outdoor Advertising Co.
Lancaster, OH

Newman Outdoor Advertising
Jamestown, ND

Northern Illinois Outdoor Advertising Co.
Freeport, IL

Norton Outdoor Advertising, Inc.
Cincinnati, OH

Norwood Advertising, Co.
Brady, TX

Ohio Outdoor Advertising Corp.
Fremont, OH

Orde Advertising Co.
Green Bay, WI

Outdoor Communications, Inc.
Corinth, MS

Outdoor Suburban
Corsicana, TX

Outdoor West, Inc.
Tri-Cities, TN

Owens Outdoor Advertising
Van Wert, OH

Ozark Poster Advertising Co.
Harrison, AK

PBM Advertising Co.
Vienna, WV

Park Outdoor Advertising
Ithica, NY

Patrick Outdoor Media, Inc.
Dunmore (Scranton), PA

Penn York Advertising, Inc.
York, PA

Philadelphia Outdoor
Gladwyne, PA

Piedmont Outdoor Advertising Co.
Greensboro, NC

Pittsburgh Outdoor Advertising
Pittsburgh, PA

Pocono Outdoor Advertising Co.
Bangor, PA

Port Arthur Poster Advertising Co.
Port Arthur, TX

Porter Poster Service
Richmond, IN

Racine Advertising Co.
Kenosha, WI

Reading Outdoor Advertising Co.
Centralia, IL

Reagan Outdoor Advertising, Inc.
Salt Lake City, UT

Richards of Course, Inc.
Syracuse, NY

Robbinswood, Inc.
Rockford, IL

Rochester Outdoor Advertising
Rochester, NY

Root Outdoor Advertising, Inc.
Toledo, OH

Sapp Outdoor Advertising Co.
Statesboro, GA

Schloss Outdoor Advertising Co.
Charlotte, NC

Schwab Advertising System, Inc.
Davenport, IA

Shaw Poster Advertising Co.
Grand Forks, ND

Silsbee Poster Advertising Co.
Port Arthur, TX

Skoglund Communications, Inc.
La Crosse, WI

Smith Advertising Co.
Petersburg, VA

Southern Ohio Outdoor Advertising Co., Inc.
Hillsboro, OH

Spomer Outdoor, Inc.
Joplin, MO

Springfield Advertising Co.
Springfield, MA

Springfield Outdoor Advertising Co.
Springfield, OH

Staff Outdoor Advertising
East Liverpool, OH

Stait Outdoor Advertising Company
Philadelphia, PA

Standard of Appleton, Inc.
Appleton, WI

Standish-Johnson Company
Providence, RI

State Outdoor Advertising, Inc.
Gary, IN

H.A. Steen Industries, Inc.
Philadelphia, PA

Stewart Poster Advertising
Clinton, IA

Jay B. Stott Outdoor Advertising
Chico, CA

Summey Sign & Outdoor Advertising Co.
Black Mountain, NC

Sunrise Outdoor Advertising, Inc.
Garden City, NY

Texas United Outdoor Advertising Co., Inc.
Fort Worth, TX

Turner Advertising Co.
Atlanta, GA

Van Wagner Advertising Corp.
Jamaica, NY

Victor Sign Corporation
Chicago, IL

Virginia Outdoor, Inc.
Lynchburg, VA

Vivid, Inc.
Janesville, WI

Vogel Outdoor Advertising
Rochester, MN

Wardlow Advertising Co.
Waynesboro, GA

Waycross Outdoor Advertising Co.
St. Simons Island, GA

Weatherby Advertising Company
Jefferson City, MO

Western Advertising System
Abilene, TX

Whiteco Metrocom
Merrillville, IN

Whitehead Outdoor
Silver Spring, MD

Whitmier & Ferris Company, Inc.
Buffalo, NY

Woodie Outdoor Advertising Co., Inc.
Bluefield, WV

Y-Knot Outdoor Advertising, Inc.
Chariton, IA

APPENDIX C

STATE OF CALIFORNIA — BUSINESS AND TRANSPORTATION AGENCY
DEPARTMENT OF TRANSPORTATION
1120 N Street
Sacramento, California 95814

August 7, 1980

Vernon A Clark
President
Outdoor Advertising Association of America
Suite 403,
1899 L Street, N.W.
Washington, D.C. 20036

Re: Local Ordinances Prohibiting Signs

Dear Mr. Clark:

This letter is in response to your inquiry (made through Ronald W. Beals, attorney for the California State Outdoor Advertising Association) whether the Outdoor Advertising Section of the California Department of Transportation has any information concerning control of signs by cities and counties.

The Outdoor Advertising Section is charged with enforcement of the State Outdoor Advertising Act (Bus & Prof Code Sec. 5200 et seq). This includes provisions adopted pursuant to federal law (the 1958 Bonus Act and the 1965 Penalty Act, found at 23 U.S.C. 131), as well as additional state regulations.

We are concerned with local ordinances for several reasons mainly: (1) Outdoor Advertising permits can only be issued in 49 counties and 108 cities with receipt of a Certificate Zoning Compliance (CZC) and (2) signs along Interstate and Primary Highways can only be placed in areas zoned for commercial or industrial purposes. Additionally, as my Section receives many general inquiries about sign law we

have become familiar with the sign regulation provisions of many ordinances.

In order to facilitate our activities, we have attempted to keep a current copy of every California city and county ordinance dealing with regulation of Outdoor Advertising. We currently have approximately 470 such ordinances on file.

I have reviewed these ordinances to see how many totally prohibit new signs. I have found 209 ordinances prohibit all new signs. Attached are lists of the counties and cities which in my opinion contain prohibitory ordinances.

Please note that I am neither an attorney nor have I asked for a complete legal review on each ordinance. This is my best opinion; I make no judgment on the enforceability of any of these ordinances nor do I personally know how they are actually enforced. Additionally, I have not included cities and counties whereas a matter of fact signs may not be built, but where the ordinance would in theory allow them. I am reasonably confident that this list is up to date and accurate.

If I can be of any further assistance to you, please feel free to call on me.

Very truly yours,

/s/ STAN LANCASTER
Stanley Lancaster
Chief, Outdoor Advertising Section

Enclosure

Cities — Prohibitory Ordinances

Alameda
Angels
Arcadia
Arcata
Atherton
Atwater
Auburn
Avalon
Belmont
Belvedere
Berkeley
Beverly Hills
Bradbury
Brea
Brentwood
Brisbane
Buena Park
Burlingame
Camarillo
Campbell
Capitola
Carlsbad
Carmel-By-The-Sea
Carpinteria
Ceres
Cerritos
Chico
Chino
Chula Vista
Claremont
Cloverdale
Coachella
Colfax
Colma
Compton
Corona
Coronado
Corte Madera
Costa Mesa
Cupertino
Cypress
Davis
Del Mar
Desert Hot Springs
Duarte
El Cajon
El Cerrito
El Segundo
Emeryville
Escondido
Fairfax
Fairfield
Fillmore
Folsom
Fontana
Foster City
Fountain Valley
Fremont
Fullerton
Gardena
Gilroy
Glendora
Grand Terrace
Grass Valley
Gustine
Half Moon Bay
Hanford
Hayward
Healdsburg
Hemet
Hercules
Hermosa Beach

Hidden Hills
Hillsborough
Huntington Beach
Imperial Beach
Indian Wells
Indio
Irvine
Jackson
Kerman
King
La Canada Flintridge
Lafayette
Laguna Beach
La Habra
La Habra Heights
La Palma
La Puente
La Verne
Livermore
Livingston
Loma Linda
Lomita
Los Alamitos
Los Altos
Los Altos Hills
Los Banos
Los Gatos
Madera
Manhattan Beach
Manteca
McFarland
Menlo Park
Merced
Mill Valley
Millbrae
Milpitas
Modesto
Monrovia
Montclair
Monterey
Moraga
Mountain View
Napa
National City
Nevada City
Newark
Newman
Newport Beach
Norco
Novato
Ojai
Ontario
Orange
Oxnard
Pacifica
Pacific Grove
Palm Desert
Palm Springs
Palo Alto
Palos Verdes Estates
Pico Rivera
Piedmont
Pismo Beach
Placentia
Pleasant Hill
Pleasanton
Porterville
Port Hueneme
Portola Valley
Rancho Cucamonga
Redlands
Redwood City
Rolling Hills
Rolling Hills Estates
Rosemead
Salinas

San Anselmo
San Clemente
San Dimas
San Gabriel
San Juan Capistrano
San Luis Obispo
San Marcos
San Marino
San Mateo
San Rafael
Santa Cruz
Santa Maria
Santa Paula
Santa Rosa
Saratoga
Sausalito
Seaside
Sebastopol
Sierra Madre
Signal Hill
Simi Valley
Sonoma
Sonora
South Pasadena
Sunnyvale
Temple City
Thousand Oaks
Tracy
Tulare
Turlock
Tustin
Union City
Upland
Ventura (San Buenaventura)
Visalia
Vista
Walnut
Walnut Creek
West Covina
Woodlake
Woodland
Yorba Linda

Counties — Prohibitory Ordinance

Amador
Calaveras
Inyo
Lake
Marin
Mariposa
Monterey
Napa
Nevada
Placer
San Luis Obispo
Santa Cruz
Solano
Sonoma
Tuolumne
Ventura
Yolo

Counties With Lawsuit

Los Angeles
Orange
Riverside
San Diego
San Francisco

Cities With Lawsuit

Chula Vista
Costa Mesa
El Cajon
Huntington Beach
La Habra
Palm Desert
Rancho Mirage
Alameda
Brisbane
Glendale
La Mesa
Pomona
San Diego
San Francisco
Santa Paula
Santa Cruz
Berkeley
Hayward
Mountain View
Oakland
San Rafael
Arcata
Carpenteria
Modesto
Salinas
Santa Barbara
Madera
Visalia
Coachella

No. 80-195

IN THE

Supreme Court of the United States

October Term, 1980

METROMEDIA, INC.,

Appellant,

vs.

CITY OF SAN DIEGO, a municipal corporation, and DOES I through XX, Inclusive,

Appellees.

PACIFIC OUTDOOR ADVERTISING CO., INC.,

Appellant,

vs.

THE CITY OF SAN DIEGO, a municipal corporation, THE CITY COUNCIL OF SAN DIEGO, VOYD BEIGHTS, Zoning Administrator of the City of San Diego and DOES 1 through 10, inclusive,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

Brief in Support of Jurisdictional Statement Filed by Amici Curiae Who Rely on Outdoor Advertising to Communicate.

ANTHONY MICHAEL GLASSMAN,
GLASSMAN & BROWNING,
360 North Bedford Drive,
Suite 204,
Beverly Hills, Calif. 90210,
(213) 878-1600,
Attorneys for Amici Curiae.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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Appellant,

vs.

THE CITY OF SAN DIEGO, a municipal corporation, THE CITY COUNCIL OF SAN DIEGO, VOYD BEIGHTS, Zoning Administrator of the City of San Diego and DOES 1 through 10, inclusive,

Appellees.

Brief in Support of Jurisdictional Statement Filed by Amici Curiae Who Rely on Outdoor Advertising to Communicate.

QUESTION PRESENTED

Does the First Amendment to the Constitution of the United States permit the elimination of the medium of communication by signs?

AMICI CURIAE PARTICIPATING HEREIN

American Advertising Federation
American Association of Advertising Agencies
California Avocado Commission
California Motel Association
California Museum Foundation of the California Museum of Science and Industry
Certified Grocers of California, Limited
Council for Peace and Equality in Education
County of Los Angeles, Office of the Sheriff
Glendon Craig, Commissioner California Highway Patrol
John Duffy, Sheriff of San Diego County
Family Theater Incorporated
First Church of God
Knights of Columbus, Southern California Chapter
Las Vegas Convention and Visitors Authority
Jerry Lench
Los Angeles Police Protective League
Service Corps of Retired Executives
Sickle Cell Anemia Research & Education, Inc.
Southern California Broadcasters Association, Inc.

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STATEMENT OF INTEREST

These amici curiae have joined together to present this brief because of the severe restriction which the City of San Diego has imposed on their ability to communicate. Amici are representative of the large number of individuals and organizations who use outdoor advertising in California and throughout the nation to convey information to the public. For some amici and for some messages, alternative means of communication are inadequate. For other amici, there is simply no meaningful alternative.

Unless this Court strikes down the challenged ordinance, the ability of amici to communicate in San Diego will be seriously impaired. Furthermore, since the decision of the California Supreme Court establishes a precedent which will allow other cities and counties within the State of California to enforce existing ordinances of similar effect, and other cities and counties in California to adopt and enforce new ones, the restraint on communication in San Diego has statewide implications.

The only meaningful use of signs permitted under San Diego's Ordinance No. 10795 (N.S.) is by owners of land who wish to sell or rent that property or identify a business or activity conducted on that land. The types of information which these amici wish to continue disseminating in San Diego and elsewhere cannot be adapted to the narrow, landowner oriented, exceptions tolerated by San Diego's ordinance. The medium through which they have chosen to communicate with the public in the past will be eliminated by the San Diego ordinance. Other media are unsuitable, inefficient or prohibitively expensive.

The following is a brief statement identifying the individuals and organizations filing this brief and describing their respective uses of outdoor advertising.

The AMERICAN ADVERTISING FEDERATION is a national trade association. Its membership includes pro-

ducers and sellers of consumer products and services, advertising agencies, magazine and newspaper publishers, radio and television broadcasters and networks, outdoor advertising associations and various other media companies and groups. Also included in the membership are 24 other trade associations and 193 local advertising clubs and federations throughout the United States which have a combined membership of over 20,000 advertising practitioners.

The members of the American Advertising Federation utilize outdoor advertising for a wide variety of messages. Each distinct medium of communication has individual, unique and peculiar characteristics and no particular medium can satisfy every communication need. Outdoor advertising has special advantages in introducing new products, establishing name recognition, conveying point of sale information and directing consumers to sales outlets. Outdoor advertising is particularly important for smaller businesses with limited advertising budgets which preclude utilization of the more expensive mass media. Outdoor advertising enables a small business to portray a message on a sign which can appear as impressive as that of a larger business. The same is rarely true for television, radio or magazines where production costs are much higher. Outdoor advertising is a particularly effective medium in tailoring a message to the specific geographic and/or demographic market desired.

The AMERICAN ASSOCIATION OF ADVERTISING AGENCIES is a national trade organization. Its membership represents 75 percent of all advertising agency business in the United States. Its members utilize outdoor advertising for all types of advertising campaigns for national, regional and local advertisers. Outdoor advertising is often selected as the only means of transmitting a message to the public. Often it is utilized in conjunction with other media in campaigns in which the specific message in one medium will supplement or complement the message in the other. Cost

is frequently a consideration in selecting outdoor advertising because it is a substantially less expensive medium for reaching large numbers of persons.

The CALIFORNIA AVOCADO COMMISSION is a corporation created by the California State Legislature, financed by approximately 8,500 California avocado growers, to promote the growth and welfare of the avocado industry. It represents California avocado growers in the areas of advertising, research and government relations. The Commission regularly uses outdoor advertising to encourage consumption of avocados. Outdoor advertising has proved to be particularly effective in conveying suggested uses for avocados in a colorful, graphic and appetizing fashion. The Commission has also discovered that by including the names of individual retailers located in the vicinity of the sign, it has been able to achieve highly successful special promotions.

The CALIFORNIA MOTEL ASSOCIATION is a trade association consisting of motels throughout the State of California. Outdoor advertising enables member motels to inform the traveling public of their existence, facilities and locations. This advertising is particularly important to independent, non-chain motels which cannot build name identity through broad-based national or regional advertising campaigns. Other media cannot substitute for outdoor advertising because tourists generally select their lodging before they are exposed to other media and because no other medium can come close to reaching the same percentage of persons who are actually using the roadways in the geographic vicinity of a motel and who are then in the market for lodging.

The CALIFORNIA MUSEUM FOUNDATION OF THE CALIFORNIA MUSEUM OF SCIENCE AND INDUSTRY is a private organization which raises funds from the public to support the museum. The museum receives 75% of its funding from the Foundation and the other 25% from

the State of California. Approximately 3,000,000 people visit the museum and attend its scheduled programs annually. Because of the large number of temporary exhibits and programs at the museum, the museum must be able to inform the public of current exhibits and programs. The museum relies on outdoor advertising to do so because of its low cost, its capacity for disseminating current information and its ability to reach tourists who may have limited access to other media.

The CERTIFIED GROCERS OF CALIFORNIA, LIMITED is a retailer-owned food wholesaler which operates as a cooperative buying and distributing organization for approximately 4,000 retail outlets. The organization supplies over 25,000 consumer items to member stores, including products under labels controlled by the Association. These controlled label products are basic to the ability of the member stores to compete with national and regional chains which spend huge sums to advertise their private labels. Because of the disparity in advertising budgets, outdoor advertising is vital to the ability to compete with the private labels of chains. This association's budget is only 20 percent of what some chains spend for television advertising alone. Because of outdoor advertising's high value per dollar, the organization spends approximately 75 percent of its advertising budget for outdoor advertising. The balance is spent on radio advertising so as to provide a complementary combination of audio and visual exposure.

The COUNCIL FOR PEACE AND EQUALITY IN EDUCATION was formed in 1977 by a group of business and professional leaders in the Los Angeles area to support peaceful implementation of a school desegregation program. The group took a neutral stance on the issue of mandatory busing in order to provide an organization in which individuals of all viewpoints could join together to urge that the law be obeyed and that the court plan, regardless of content, be peacefully implemented. The Council sought public ser-

vice space from the various media, including television and radio, but were rejected by all but outdoor advertising. Broadcasters expressed concern over the "controversial" nature of the proposed messages. The outdoor advertising industry, on the other hand, provided 100 signs throughout the City of Los Angeles (90 in English and 10 in Spanish), which attracted considerable attention to the Council's efforts. This attention was increased when radio and television stations, which had denied the request for public service coverage, gave news coverage to the billboard campaign. Television stations even showed pictures of the billboards during their news programs.

The COUNTY OF LOS ANGELES, OFFICE OF THE SHERIFF; GLENDON CRAIG, COMMISSIONER, CALIFORNIA HIGHWAY PATROL; JOHN DUFFY, SHERIFF, SAN DIEGO COUNTY; and LOS ANGELES POLICE PROTECTIVE LEAGUE are representative of agencies and individuals charged with law enforcement in the cities and counties and on the state and federal highways of California. Each of these amici has, like many other law enforcement agencies in the State of California, utilized outdoor advertising as an aid in law enforcement and traffic safety programs. Examples include encouraging the use of seatbelts (see Appendix I to Appellants' Jurisdictional Statement), adherence to the 55-mile-per-hour speed limit (*Id.*), as well as crime prevention programs, reward posters and a variety of other law enforcement messages. Law enforcement officers have also used outdoor advertising to publicize labor disputes (*Id.*). Additionally, outdoor advertising has been utilized for recruitment purposes, particularly minority recruitment, because of the ability of outdoor advertising to focus its coverage on those geographic areas most heavily populated by minority groups. No other medium can adequately replace outdoor advertising in reaching motorists with traffic safety messages because they see those messages while they are actually driving. Amici would neither utilize

outdoor advertising nor participate in this brief were they not convinced, based upon their experience and responsibilities in the area of traffic safety, that there is no evidence to support the conclusion that outdoor advertising constitutes a traffic hazard.

FAMILY THEATER PRODUCTIONS is an organization which was formed by the Reverend Patrick Peyton to promote family prayer. Since 1956, the organization has utilized outdoor advertising to proclaim a variety of religious messages generally linked to the organization's slogan, "The Family That Prays Together, Stays Together." Over the last four years, this organization has used outdoor advertising space with a value of nearly $1,800,000, representing approximately 3,000 displays each year.

The FIRST CHURCH OF GOD, located at 5856 West Boulevard, Los Angeles, California, has used outdoor advertising to draw the attention of the public to its services. In 1976, this Church used 20 billboards in the south central area of Los Angeles surrounding the Church. Response to the billboards was overwhelming and the Church has used 20 billboards on each of the two additional occasions. Newspaper advertising, in contrast, has yielded very little success. No other medium is as ideally suited to serve the communication needs of the Church. Outdoor advertising can direct the message exclusively to the geographic area in which the Church is located and can reach virtually everyone who goes outdoors in that area. Approximately 40 percent of the present congregation was first made aware of the Church and its services through the billboard advertising.

The KNIGHTS OF COLUMBUS, SOUTHERN CALIFORNIA CHAPTER, is a fraternal organization of Catholic men. The Chapter has 88 councils with a total of 19,000 members. Each year at Christmas time, the Chapter communicates a "Christ in Christmas" message to the public through the use of a large number of outdoor advertising displays. Other media are not as affordable and do not create

the same public impact for the message. Outdoor advertising is effectively the only medium available to the Chapter to communicate its Christmas message to the public at large in Southern California.

The LAS VEGAS CONVENTION AND VISITORS AUTHORITY seeks to promote the tourist and convention business of the City of Las Vegas, Nevada. In 1980 alone, the organization will spend approximately $368,000 on outdoor advertising in the Southern California area (from which 38 percent of all visitors to Las Vegas are drawn).

JERRY LENCH is a consultant with Jerry Lench & Associates. In 1973, Mr. Lench was responsible for advertising and public relations activity during a strike by the Oil, Chemical & Atomic Workers International Union against the Shell Oil Company. On behalf of the Union, Mr. Lench sought to convey a "Don't Buy Shell!" message to the public at large. He approached and was rejected by every other medium of mass communication. The Union message, which was carried on outdoor advertising (*Id.*), could not have been communicated to the public at large in any medium of mass communication had it not been for outdoor advertising.

The SERVICE CORPS OF RETIRED EXECUTIVES is an organization comprised of retired business executives. The Corps, which is sponsored by the Small Business Administration and the City of Los Angeles, assists businessmen trying to get started, experiencing problems or trying to expand. Advertising the Corps on outdoor advertising has helped to create name identification and a positive image which has been of great benefit to the organization. When the Corps' message is posted on outdoor advertising displays, the Corps immediately receives hundreds of telephone calls inquiring about the availability of its services. The results from outdoor advertising have been far better than other media, particularly newspapers and handbills which have created very few inquiries.

SICKLE CELL ANEMIA RESEARCH & EDUCATION, INC. was organized in September, 1971 to educate the public about and to perform research into Sickle Cell Anemia. The organization faced initial difficulties because of questions regarding government participation and the absence of financial assistance from large charitable organizations. The community at large was skeptical because there had been a number of fraudulent fund raising efforts in the name of Sickle Cell Anemia. The organization approached all of the media for assistance and was turned down by every medium except outdoor advertising. In 1973, because of a major billboard campaign, almost $100,000 was received in contributions. The organization started to move forward, citizens began to support the organization and other media became interested and began to provide coverage. The organization now has an extensive program of testing citizens for Sickle Cell Anemia and educating the community at large about the disease, in addition to continuing research to learn more about the disease. The organization continues to utilize outdoor advertising.

The SOUTHERN CALIFORNIA BROADCASTERS ASSOCIATION, INC., which was organized in 1937, has a current membership of 150 radio stations and 21 television stations throughout the Southern California area. The members of the Association use outdoor advertising to communicate with their listeners and viewers. Outdoor advertising enables radio stations to direct motorists' attention to the call letters of a specific station during so-called "drive time," which is a prime period for radio audiences. For radio and television stations, outdoor advertising is one of the most effective means of informing the viewing public of programming or format changes. Outdoor advertising can be concentrated on viewers and listeners within the area of a broadcast signal. Since it is difficult for broadcast media

to increase their audiences through the use of other broadcast media, a non-broadcast medium such as outdoor advertising is extremely important.

ARGUMENT.

SUMMARY OF ARGUMENT.

The immediate question before this Court is whether a substantial federal constitutional question is raised by the prohibition of all "off-site" sign structures located on private property which are used for the display of lawful commercial and non-commercial messages to members of the general public traveling on the public streets and highways. The answer to that question is exceedingly important to the organizations which have joined together to file this brief.[1] The decision from which the appeal has been taken permits an egregious invasion of the constitutional rights of these amici as well as appellants. Their most important method of communication with the public is threatened with extinction.

These diverse amici share a single unifying characteristic: They use and rely upon outdoor advertising to transmit messages to the public. They are representative of those whom the stipulated facts recognize as dependent upon outdoor advertising because it is the most suitable, affordable, accessible, efficient, or effective medium (A. 123a-126a, JS 22, 23, 28)[2]

Outdoor advertising is a distinct and unique medium of communication. The effect of the San Diego ordinance is to destroy it and to confine communication by sign to property identification. The ordinance, with insignificant exceptions, denies everyone the right to "advertise" by sign in San Diego. The system which enables persons to purchase

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[1]Written consent to the filing of this amicus curiae brief by the parties to this litigation is being filed with the Clerk of the Court simultaneously herewith.

[2]References to "A. ...." are to the appropriate pages of the Appendix to Appellants' Jurisdictional Statement. References to "A. ...., JS ...." are to the appropriate pages of the appendix and paragraph numbers of the Joint Stipulation of Facts set forth at pages A. 119a through 127a (Appendix H) of the Appendix to the Jurisdictional Statement.

sign space for communications will be dismantled and destroyed. While the California Supreme Court has hinted that these amici and other advertisers might retain the ability to "assert" that the San Diego ordinance "cannot constitutionally *be applied* to prevent" them from using billboards to proclaim their messages (A. 23a, n.14, Court's emphasis), this is a meaningless right if the signs no longer exist. Individual advertisers cannot *create* anew a network of signs whenever they have a message to transmit. San Diego's wanton destruction of a communications medium has been promulgated without consideration of the damage done or the valuable function of outdoor advertising, without regard to less devastating alternatives, without proof of any compelling or even substantial need, and solely because San Diego's governing council has determined that it considers signs to be unattractive.

I.

Outdoor Advertising Is a Unique Medium.

The stipulated facts reflect many characteristics of outdoor advertising which are unique and special to this medium. Certain other features are manifest from the nature of the medium. (a) The message may be placed on a specific sign or signs in a single or carefully selected group of locations. It is not necessary, as it is for users of radio, television and newspapers, to purchase the ability to communicate to an entire metropolitan community in order to reach those who are potential customers in a certain market, potential voters for a particular candidate or potential targets for a specific message. An advertiser may purchase one, ten, one hundred or any other number of signs depending upon his peculiar needs. (b) The message must of necessity be simple and direct. Expensive production facilities are not necessary. There are no broadcast facilities and licenses or printing presses to support. (c) The message may be seen by members of the public repeatedly during a particular

month — as often as a member of the desired audience traverses a particular location or locations every month. (d) The message may be dramatic, memorable, colorful and out-of-doors. (e) The message requires virtually no effort or time to be seen and remembered. (f) Once posted, the message does not require any human participation in disseminating the message. Unlike leaflets, no one needs to be available to pass it out to every individual member of the audience. (g) The message can reach thousands of persons per hour and tens of thousands of persons per day. It is genuinely a mass medium.

II.

The San Diego Ordinance Broadly Discriminates Against Certain Types of Messages.

San Diego Ordinance No. 10795 (N.S.) defines its purposes[3] (A. 106a-107a) partially in terms of eliminating excessive, confusing or hazardous displays. However, since *all* outdoor advertising displays, as that term is defined in the stipulated facts (A. 123a-126a, JS 21, 22, 23, 24, 25), are eliminated by the ordinance (A. 120a, 126a, JS 2, 29), and the ordinance makes no effort to address itself to any sign which might actually be hazardous, excessive or confusing, the other objective articulated in the "Purpose and Intent" portion of the ordinance stands revealed as the true

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[3]As discussed in greater detail, *infra*, the City of San Diego offered *no* evidence of the objectives sought to be achieved by the ordinance other than the preamble to the ordinance and *no evidence whatsoever* with respect to whether the ordinance would achieve its stated objectives or whether those objectives could be achieved with less draconian measures.

goal of the ordinance.[4] The "purpose", as plainly stated, is the improvement of aesthetic qualities in San Diego. The method by which the ordinance seeks to achieve this goal is the elimination of signs as "advertisement" and the restriction of signs to "identification". (A. 106a.) Thus, the ordinance prohibits signs which are vehicles for the communication of all messages except those which identify or relate to the occupant of the land on which it is located.[5] And, the only persons who can use signs to communicate a message are those who not only own land but have a business on it which they wish to identify in some way. A non-land owning person with a message must resort to either a more expensive medium or a more primitive one — at immeasurable and varying cost to the effectiveness of the message.

Simply stated, in order to improve the City's appearance, San Diego will no longer allow a person to communicate a message intended to persuade, convince, entice, encour-

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[4]Divining the actual objective of an ordinance as opposed to the purported purpose by considering what it embraces and what it has chosen not to embrace is a process frequently undertaken by this Court. For example, in *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 93-94 (1977), the Court was able to discern that the ordinance was not genuinely concerned with the place or manner of speech, because similar types of signs in similar locations were not prohibited. Similarly, in *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214 (1975), the Court was able to determine that the regulation was not aimed at traffic safety, because the prohibition was both overinclusive and underinclusive for that purpose. San Diego's ordinance is similar as far as traffic safety is concerned. It is not limited to signs which might be dangerous to motorists. On the other hand, it does not address "on-site" signs which might present hazards. *See also: Carey v. Brown*, 48 L.W. 4756 (June 20, 1980). "The apparent over- and underinclusiveness of the statute's restriction would seem largely to undermine [the] claim that the prohibition . . . can be justified by reference to the state's interest in maintaining domestic tranquility." (at 4758.)

[5]That the exceptions for bus bench signs, transit vehicle signs, commemorative and governmental signs and the like (A. 110a-111a) are not meaningful is evidenced by Appellee's stipulation that its ordinance would, in fact, eliminate outdoor advertising in the City of San Diego.

age, educate or explain by fixing that message on a permanently placed sign. While considerably more severe in its impact, San Diego's prohibition is somewhat reminiscent of the restriction which was considered and rejected a few months ago by this Court (prohibiting "promotional", but allowing "informational" communication concerning electricity) in *Central Hudson Gas & Electric Corporation v. Public Service Commission*, 100 S.Ct. 2343 (1980). Furthermore, San Diego's ordinance bans the message simply because the form of its presentation is considered unattractive or offensive — a concept heretofore considered repugnant to the Constitution. *Spence v. Washington*, 418 U.S. 405 (1974); *Cohen v. California*, 403 U.S. 15 (1971).

III.

The Prohibition Is Total; Its Scope Is Absolute.

The issue presented by this case, of course, is not simply whether outdoor advertising displays or billboards may be eliminated in San Diego. San Diego is a large and diverse city. If it may erase the medium of outdoor advertising, every other city (or state) may do so as well. There are simply no characteristics peculiar to San Diego which would distinguish it from any other city which might desire to eliminate all billboards. Further, if the mere assertion of aesthetics is the rationale for the ordinance, as it indisputably is, and if cities may eliminate outdoor advertising from commercial and industrial districts, they may surely eliminate them from non-commercial areas. And unincorporated areas may also ban them altogether. Thus, the issue squarely presented by this case is whether the non-temporary off-site sign may be totally banned from American life.

IV.

The "Time, Place and Manner" Formula Is Not Applicable.

It is submitted that only the most awkward rationalization will tolerate the conclusion that total elimination of a sep-

arate method of communication is a time, place and manner restriction on speech. "That the proscription applies only to one mode of communication, therefore, does not transform this into a 'time, place, or manner' case." *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 94 (1977). Speech by and through billboards will be permitted at *no time* and in *no place* under San Diego's ordinance. The outdoor advertising "manner" of speech is to be extinguished. The "time, place and manner" rubric was fashioned and has been applied to rationalize minor restrictions on speech which do not prohibit or seriously impede the transmission or receipt of the message. It has been held to authorize limits on overamplified loud speakers (Compare *Kovacs v. Cooper*, 336 U.S. 77 (1949) with *Saia v. New York*, 334 U.S. 558 (1948)), and precise and narrow limits on demonstrations in and around jails (*Adderley v. Florida*, 385 U.S. 39 (1966)), schools (Compare the two ordinances considered in *Grayned v. City of Rockford*, 408 U.S. 104 (1972)), in courtrooms (See *Cox v. Louisiana*, 379 U.S. 559 (1965)), and to authorize narrow restrictions on public access to private homes (*Rowan v. Post Office Dept.*, 397 U.S. 728 (1970)). This Court has *never* held that what amounts to a formula for balancing can authorize the abrupt, mandatory cessation of an entire manner of communication.

V.

Outdoor Advertising Is a Reasonable Method of Communication in the Areas and Under the Circumstances in Which It Is Conducted.

This Court has recently stated that "[t]he nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place and manner that are reasonable.' " *Grayned, supra*, 408 U.S. at 116. Earlier, the Court noted that " '[t]he truth is that open spaces and public places differ very much in their character, and before you could say whether a certain thing could be done in a

certain place you would have to know the history of the particular place.' " *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974).

This wisdom was completely ignored by the California Supreme Court. It concluded that the "distinction between prohibition and regulation in this case is one of words and not substance." (A. 15a.) Considering whether the medium should be banned in the three percent of the City where commerce and industry is permitted to take place, the California Supreme Court found that arguments concerning the difference between regulation and prohibition was "sophistry", a "mere play on words." (A. 17a.)

Hence, the stipulated facts that outdoor advertising in San Diego had been legally conducted for over sixty years, in areas of commerce and industry, adjacent to business thoroughfares and from locations on private property in zones where the City had expressly authorized signs to be erected, away from homes, and in a very small segment of the City, were ignored. Indeed such facts were considered irrelevant, sophistry. However, this Court has stated that the "reasonableness" of the restraint cannot be evaluated without considering such factors. It is plain that the California Supreme Court abdicated its responsibility to evaluate the reasonableness of the ordinance in light of the nature, history and suitability of the places where outdoor advertising is conducted in San Diego.

VI.

The Burden of Justifying the Prohibition Was Lifted From the City and the Burden of Disproving the Justification for the Restriction Was Placed on Appellants.

It is virtually impossible to find a case involving a restriction on the ability to communicate which does not discuss the responsibility of government to show that the restriction serves compelling governmental interests and that

the restraint both serves those interests and does so in the least restrictive fashion possible. The burden is on the government: "We must consider whether the State can demonstrate that its regulation is constitutionally permissible." *Consolidated Edison Co. v. Public Service Commission*, 100 S.Ct. 2326, 2332 (1980). As this Court has observed, the nature of the governmental interest which must be affirmatively established has been variously labeled as "compelling",[6] "substantial",[7] "subordinating", "paramount", "cogent", "strong" or "important". *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968). Whichever verbal formula is applied however, government must establish that there is a real and important need for the restraint and justify the method selected to impose it. For example, in *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), the Court observed that the City of Jacksonville had offered "no justification" (422 U.S. at 215) for distinguishing between movies containing nudity from other movies which might arguably distract a motorist. In *Linmark, supra*, the Court noted that the Township "failed to establish" (431 U.S. at 95) that the ordinance was necessary to serve the stated need, found that the evidence did not support the Council's "apparent fears" (*Id.*) that the need existed, and that the record did "not confirm the township's assumption" (*Id.* at 95-96) that the restriction adopted would satisfactorily resolve the assumed problem. Unsupported assertions, while frequently adequate to support economic regulation against substantive due process challenges, will not serve to justify restraints on communication. " '[U]ndifferentiated fear or apprehension of disturbance' " or the " 'mere desire to avoid discomfort and unpleasantness' " (*Grayned v. City of Rockford, supra*, at 117) will not support even minor

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[6]*Consolidated Edison Co. v. Public Service Commission, supra*, at p. 2331.

[7]*Central Hudson Gas & Electric Corp. v. Public Service Commission, supra*, at 2350.

encroachments on First Amendment liberties. "[T]he justifications . . . must be carefully scrutinized." *Carey v. Brown, supra*, at 4757.

The California Supreme Court turned this standard of proof on its head. The entire burden was placed on appellants. The Court held that appellants "have failed to prove that the Ordinance lacks a reasonable relationship to the achievement of these goals [traffic hazards, aesthetics, the protection of property values]." (A. 17a.)[8] In fact, the Court simply stated, relying exclusively on the "presumption of validity" and with complete deference to the unsupported legislative pronouncements, that "the ordinance serves significant governmental interests — promoting traffic safety and improving the appearance of the community. . . ." (A. 22a.) Adequate alternative channels of communication were *found* by the California Supreme Court to exist not only in the absence of any proof to that effect by the City of San Diego, but in direct contradiction to the agreed facts.

CONCLUSION.

These amici are representative of the actual parties whose ability to communicate will be severely abridged if this Court does not agree to consider the important constitutional questions raised by this litigation and reverse the California Supreme Court. If their means of communicating can be eliminated because its form is not pleasing to the government, without proof that it creates any damage or offends any persons, and without considering less restrictive alternatives, the First Amendment certainly provides meager

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[8]While this statement appears in the "police power" portion of the California Supreme Court's opinion, the Court's analysis in that portion of the opinion was simply carried forward to the First Amendment section. The Court never did consider whether, under the First Amendment, the City of San Diego had established any important governmental interest which was achieved by prohibiting billboards and which could not be achieved with a more limited restriction.

protection to those who cannot afford to advertise in newspapers, magazines, radios or television.

Respectfully submitted,

ANTHONY MICHAEL GLASSMAN,
GLASSMAN & BROWNING,
360 North Bedford Drive,
Suite 204,
Beverly Hills, Calif. 90210,
(213) 878-1600,
Attorneys for Amici Curiae.

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No. 80-195

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

METROMEDIA, INC.,

Appellant,

v.

CITY OF SAN DIEGO, a municipal corporation, and DOES I through XX, inclusive,

Appellees.

PACIFIC OUTDOOR ADVERTISING CO., INC.,

Appellant,

v.

THE CITY OF SAN DIEGO, a municipal corporation, THE CITY COUNCIL OF SAN DIEGO, VOYD BEIGHTS, Zoning Administrator of the City of San Diego and DOES 1 through 10, inclusive,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

BRIEF OF APPELLANTS

FLOYD ABRAMS
80 Pine Street
New York, New York 10005
(212) 825-0100

Of Counsel:
DEAN RINGEL
SUSAN BUCKLEY
SUSAN E. FINE
MARTHA A. SCARF
CAHILL GORDON & REINDEL

THEODORE B. OLSON
515 South Flower Street
Los Angeles, California 90071
(213) 488-7000

Of Counsel:
WAYNE W. SMITH
GIBSON, DUNN & CRUTCHER

Attorneys for Appellants

November 28, 1980

Questions Presented

1. May the City of San Diego, consistently with the First and Fourteenth Amendments to the United States Constitution, eliminate and totally prohibit all outdoor advertising within the City when, pursuant to stipulated facts, (a) outdoor advertising exists only in areas of San Diego zoned for commercial and industrial purposes; (b) outdoor advertising is a distinct means of communication and a medium for the expression of ideas and a forum for the communication of messages to the public; and (c) outdoor advertising communicates valuable commercial, political and social information which many businesses, politicians and other persons rely upon because other forms of advertising are insufficient, inappropriate and prohibitively expensive?

2. May the police power of the City of San Diego be utilized, consistently with the Fourteenth Amendment to the United States Constitution, to eliminate and totally destroy the legitimate and lawful business of outdoor advertising within San Diego?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-195

METROMEDIA, INC.,

Appellant,

v.

CITY OF SAN DIEGO, a municipal corporation, and DOES I through XX, inclusive,

Appellees.

PACIFIC OUTDOOR ADVERTISING CO., INC.,

Appellant,

v.

THE CITY OF SAN DIEGO, a municipal corporation, THE CITY COUNCIL OF SAN DIEGO, VOYD BEIGHTS, Zoning Administrator of the City of San Diego and DOES 1 through 10, inclusive,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

BRIEF OF APPELLANTS

Opinions Below

The Memorandum of Intended Ruling of the Superior Court, County of San Diego, State of California and Order enjoining enforcement of San Diego Ordinance No. 10795

(New Series) are unreported. Copies are contained in the appendix to the Jurisdictional Statement commencing at JS 81a.* The opinion of the Court of Appeal, Fourth Appellate District, was issued on February 11, 1977, was reported at 67 Cal.App.3d 84, 136 Cal.Rptr. 453, and was vacated by the action of the California Supreme Court in granting a hearing. It is contained at JS 65a. An opinion of the Supreme Court of California, initially issued on March 21, 1979, was reported at 23 Cal.3d 762, 592 P.2d 728, 154 Cal.Rptr. 212. A petition for rehearing was granted on May 23, 1979 (having the effect of vacating the March 21, 1979 opinion) and the opinion of the Supreme Court of California on rehearing was issued on April 14, 1980, as modified on denial of further rehearing on May 14, 1980. It is reported at 26 Cal.3d 848, 610 P.2d 407, 164 Cal.Rptr. 510 and is set forth at JS 1a.

Jurisdiction**

The subject of this case is the constitutionality of an ordinance adopted by the City of San Diego, California, which would totally eliminate and destroy the entire outdoor advertising industry within the city limits. In an opinion dated April 14, 1980, as modified on denial of rehearing on May 14, 1980 (JS 1a, 64a), the Supreme Court of California held San Diego Municipal Ordinance No.

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* References to "JS ....a" are to appropriate pages of the appendix to the Jurisdictional Statement.

** Pursuant to Rule 28.1, appellants advise the Court that Metromedia, Inc. has no parent or corporate affiliates and no subsidiaries other than wholly owned subsidiaries. Prior to June 7, 1979, Pacific Outdoor Advertising Co., Inc. ("POA") was a wholly owned subsidiary of Combined Communications Corporation. On June 7, 1979, POA became a wholly owned subsidiary of Gannett Co., Inc. POA has no subsidiaries. Gannett Co., Inc. has no corporate affiliates and has two subsidiaries which are not wholly owned: Mediacom Industries, Inc. and Utica Observer-Dispatch, Inc.

10795 (New Series) not to be violative of the United States Constitution. A Notice of Appeal was filed on July 25, 1980, a copy of which is set forth at JS 102a.

Jurisdiction of this Court to review the final judgment of the Supreme Court of California is conferred by 28 U.S.C. § 1257(2) (1976). Probable jurisdiction was noted by this Court on October 14, 1980.

Constitutional and Statutory Provisions

Relevant portions of the First and Fourteenth Amendments to the United States Constitution and the entirety of San Diego Municipal Ordinance No. 10795 (New Series) are set forth at JS 104a.

Statement of the Case

A. *The Stipulated Facts*

The parties—the City of San Diego and appellants—have stipulated to the basic facts which govern the disposition of this litigation.* Those facts may be summarized as follows.**

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* Under California law, both the parties and the courts are bound by the terms of the stipulation. *Greatorex* v. *Board of Administration*, 91 Cal.App.3d 54, 58, 154 Cal.Rptr. 37, 39 (4th Dist. 1979); *Capital National Bank* v. *Smith*, 62 Cal.App.2d 328, 343, 144 P.2d 665, 673 (3d Dist. 1944). This Court has, of course, frequently relied upon stipulations of fact. *See, e.g., Committee for Public Education and Religious Liberty* v. *Regan*, 444 U.S. 646, 657 n.5 (1980); *Marquette National Bank of Minneapolis* v. *First of Omaha Service Corp.*, 430 U.S. 299, 311-12 (1978); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 750 n.3, 752 nn.4, 6, 7 (1975).

** The Joint Stipulation of Facts is set forth at JS 119a as Appendix H to the Jurisdictional Statement. It is also set forth in the Joint Appendix commencing at page 41a. References to "JS ....a, ¶ ...." are to appropriate pages of the Appendix to the

1. The City of San Diego

San Diego is the second most populous city in California (JS 120a, ¶ 3) and the center of government for a county containing one and one-half million people. (JS 120a, ¶ 4) The City covers 320 square miles (JS 120a, ¶ 5), larger than the combined areas of Atlanta, Cleveland, Pittsburgh and Miami and over four times the area of the District of Columbia (Rand McNally & Co., *1979 Commercial Atlas & Marketing Guide* 55-58 (110th ed. 1979)).

San Diego is "multi-faceted, containing beaches, hills, residential areas, parks, a major seaport and naval base, a substantial commercial area, hundreds of miles of streets, highways and freeways, a large industrial area, a major airport and numerous major industries." (JS 120a, ¶ 6) Its citizens find employment in all walks of life, "including retail businesses, heavy industry, commercial centers, tourist services, agriculture, government contracts, wholesale supplies and a variety of services." (JS 120a, ¶ 7) San Diego itself consists of the old and the new, the modern and the obsolete, the aesthetically attractive and the blighted. (JS 121a, ¶ 8)

Figures contained in the San Diego General Plan adopted in 1967, which may be taken as true for all periods relevant to the litigation, indicate that citizens of San Diego were employed substantially as follows:

"Agriculture	1.6%
Construction	6.6%
Manufacturing	22.4%

Jurisdictional Statement and paragraph number of the Joint Stipulation. Quotations throughout the Statement of the Case are from the Joint Stipulation. References to "JA ...." are to appropriate pages of the Joint Appendix.

Transportation, Communication and Utilities	4.7%
Wholesale Trade	3.2%
Retail Trade	17.5%
Finance, Insurance and Real Estate	4.5%
Services	19.2%
Government	19.7%"

(JS 121a, ¶ 10)

2. The Business of Outdoor Advertising

Appellants are companies which have been legally engaged in the outdoor advertising business in San Diego for over 60 years. (JS 122a, 126a, ¶¶ 12, 15, 30) Appellants each own between 500 and 800 outdoor advertising displays in San Diego which are located on property leased to them for the purpose of erecting and maintaining such displays. (JS 122a, ¶¶ 13, 14)

All the signs owned by appellants in San Diego "are located at areas zoned for commercial and industrial purposes." (JS 123a, ¶ 20) These areas comprise only 2.8% of the total City. (JS 121a, ¶ 9)

All the displays were legally erected at substantial expense, in full compliance with state and local laws. (JS 122a, ¶¶ 15, 16) While the value of individual displays varies depending upon size, nature and location, the range is between $2,500 and $25,000,* each display having a remaining useful and substantial income-producing life in excess of 25 years. (JS 123a, 125a, ¶¶ 18, 19, 26)

Outdoor advertising signs differ in a variety of ways from on-site business signs. On-site signs advertise businesses, goods or services available on the premises. In

* As of the date of the stipulation executed on November 21, 1974. (JS 127a)

contrast, outdoor advertising companies lease real property and erect signs thereon which are made available to national and local advertisers for commercial, political and social messages. More specifically, "[o]utdoor advertising is different from on-site advertising in that:

> "(a) The outdoor advertising sign seldom advertises goods or services sold or made available on the premises on which the sign is located.
>
> "(b) The outdoor advertising sign seldom advertises products or services sold or made available by the owner of the sign.
>
> "(c) The outdoor advertising sign is, generally speaking, made available to 'all-comers', in a fashion similar to newspaper or broadcasting advertising. It is a forum for the communication of messages to the public.
>
> "(d) The copy of the outdoor advertising sign changes, usually monthly. For example, a particular sign may advertise a local savings and loan association one month, a candidate for mayor the next month, the opening of the San Diego Zoo the third month, a new car the fourth month, and a union grievance the fifth month."

(JS 123a-24a, ¶ 22)

"Outdoor advertising is customarily purchased on the basis of a presentation or campaign requiring multiple exposure. Usually a large number of signs in a variety of locations are utilized to communicate a particular advertiser's message. An advertiser will generally purchase a 'showing' which would involve the utilization of a specific number of signs advertising the same message in a variety of locations throughout a metropolitan area. Each sep-

arate sign provides exposure of various portions of the populace and each sign thereby forms an integral part of an interdependent whole. As a result, each sign in addition to producing income in and of itself, lends value to the entire system. Therefore, each sign has a value substantially more as a part of the system than it does separately. The value of each sign as a part of an overall system is not readily susceptible to precise measurement." (JS 124a-25a, ¶ 24)

"Outdoor advertising is presented in two basic standardized forms. A 'poster panel' is a 12-foot by 24-foot sign on which a pre-printed message is posted, in sheets. A 'painted bulletin' is generally a 14-foot by 48-foot sign which contains a hand painted message. The message will remain in one place for a period of time, usually a month, and will then be disassembled and replaced by another message while the first message is moved to another sign. In this way, the same hand painted message will be moved throughout a metropolitan area over a six-month or twelve-month period." (JS 125a, ¶ 25)

3. The Nature of Outdoor Advertising

Outdoor advertising serves a wide range of social functions. As noted, "[i]t is a forum for the communication of messages to the public." (JS 123a-24a, ¶ 22(c)) It is, as well, "a means of communication and a media for the expression of ideas." (JS 123a, ¶ 21)

"Outdoor advertising is available for all forms of advertising messages. For example, it has been used in the City of San Diego to advertise national and local products, goods and services, new products being introduced to the consuming public, to publicize the 'City in motion' campaign of the City of San Diego, to communicate messages from candidates for municipal, state and national offices,

including candidates for judicial office, to propose marriage, to seek employment, to encourage the use of seat belts, to denounce the United Nations, to seek support for Prisoners of War and Missing in Action, to promote the United Crusade and a variety of other charitable and socially-related endeavors and to provide directions to the traveling public." * (JS 124a, ¶ 23)

Appellants' "outdoor advertising displays produce income to a variety of segments of the national, state and local economy and stimulate the flow of trade and commerce. Land owners and advertising agencies receive income from outdoor advertising." (JS 125a, ¶ 27)

"Outdoor advertising increases the sales of products and produces numerous direct and indirect benefits to the public. Valuable commercial, political and social information is communicated to the public through the use of outdoor advertising. Many businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive." (JS 125a-26a, ¶ 28)

4. Ordinance No. 10795**

On March 14, 1972, the City Council of the City of San Diego adopted Municipal Ordinance No. 10795 (New Series)

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* Photographs of outdoor advertising displays conveying various political, community service, and public interest messages such as were viewed by the San Diego public were set forth before the California Supreme Court in a brief, *amicus curiae*, of the Pacific Legal Foundation. A number of these examples are reproduced as Appendix I to the Jurisdictional Statement at JS 128a. The photographs are of actual displays used in California and illustrate the precise facts to which San Diego stipulated. Some are referred to in the opinion of Justice Clark dissenting from the opinion of the California Supreme Court. (JS 51a)

** The text of the ordinance is set forth as Appendix G to the Jurisdictional Statement at JS 104a-18a.

("the ordinance"). (JS 120a, ¶ 1) The ordinance prohibits all outdoor advertising throughout San Diego and would, if enforced, "eliminate the outdoor advertising business" in San Diego. (JS 120a, 126a, ¶¶ 2, 29) It permits only on-site signs—*i.e.*, those which designate the owner or occupant of the premises upon which a sign is placed, or identify the premises or advertise goods manufactured or produced or services rendered there. (JS 107a)

There are a few partial exemptions for signs designating premises for sale, rent or lease, depicting time, temperature or news, for signs on benches, at bus stops and on buses and taxis, and for temporary political campaign signs which are maintained for no longer than 90 days and are removed within 10 days after the election to which they pertain. (JS 111a-12a) These exceptions would not encompass any of the advertisements set forth as Appendix I to the Jurisdictional Statement, nor any commercial use of billboards.*

All signs other than those few excepted from the reach of the statute—*i.e.*, all outdoor advertising signs—are to be removed, without compensation and at the expense of the owners, over a four-year period. (JS 107a-11a) The abatement or removal schedule set forth in the ordinance bears no reasonable relationship to the fair market value, useful life or income generated by the signs and was not designed to bear any such relationship. (JS 126a-27a, ¶ 34)

B. *The Litigation*

In these litigations commenced by appellants Metromedia, Inc. and Pacific Outdoor Advertising Co., Inc., and

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* In fact, as counsel to San Diego has conceded, the destruction of outdoor advertising sought to be effected by the ordinance would necessarily preclude billboards being used for non-commercial as well as commercial purposes. (JA 60a-61a)

later consolidated by stipulation, an injunction was sought to enjoin enforcement of the ordinance. (JA 3a, 22a) After the filing of answers (JA 16a, 33a), the completion of discovery and the negotiation, drafting and execution by the parties of the Joint Stipulation, all parties moved for summary judgment. (JA 51a, 54a)

The Superior Court granted the motion of appellants for summary judgment, holding the San Diego ordinance unconstitutional as an unreasonable exercise of San Diego's police power and an abridgement of appellants' First Amendment rights. (JS 81a-97a) Enforcement of the ordinance was permanently enjoined by the Superior Court. (JS 98a-101a)

The Court of Appeal, Fourth Appellate District, unanimously affirmed, concluding that:

> "Here, we are not dealing with an ordinance which regulates or prohibits a few signs, or which affects only signs located in certain zones or areas of the City. Enforcement of the ordinance in question will require the removal of hundreds of signs having a conceded value in the millions of dollars. The facts before us indisputably show enforcement of the ordinance will bring about substantial private loss. While the stated purposes of the ordinance may be laudable, the City presents no convincing argument why the public benefits sought cannot be achieved by more reasonable and less drastic measures. The stipulated facts simply do not support the proposition that all off-premise advertising signs within the City are public nuisances, or that it is reasonably necessary to remove all of them to promote safety, general economic interests, or even aesthetic values. The ordinance is too broad, too general and too inclusive. We have

> no doubt the enactment of the ordinance and its attempted enforcement is beyond the power of city officials and constitutes an unreasonable and arbitrary exercise of the police power." (JS 80a)

Given its conclusion that the ordinance constituted a constitutionally insupportable use of the police power, the Court of Appeal did not "consider whether the broad sweep of the ordinance also infringes upon First Amendment or Equal Protection rights or whether its amortization provisions meet constitutional standards." * (JS 80a)

The California Supreme Court reversed in an opinion joined by four of its seven members. Rejecting the conclusion of both courts that had considered the case that San Diego had exceeded the constitutional scope of its police power, the Court concluded that the expressed purposes of "elimination of traffic hazards brought about by distracting advertising displays and the improvement of the appearance of the city" (JS 6a-7a) were sufficient to permit the total destruction of the outdoor advertising industry. Notwithstanding the total absence of any proof that traffic safety was adversely affected by outdoor advertising, the Court held that (a) appellants had failed to meet their supposed burden of demonstrating that traffic safety would *not* be advanced by the ban and (b) "as a matter of law," ordinances "which eliminat[e] billboards designed to be viewed from streets and highways reasonably relat[e] to traffic safety." (JS 7a)

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* Issues relating to Equal Protection and the constitutional adequacy of the amortization provisions were among a number of those raised by appellants at judicial levels prior to this Court. Other issues raised below included partial preemption under state law (an issue as to which the California Supreme Court, on rehearing, ruled in favor of appellants (JS 26a-39a)) and the failure of San Diego to comply with the California Environmental Quality Act.

As for the aesthetic considerations offered in support of the statute, the opinion held that such considerations alone could and did justify the total elimination of the outdoor advertising industry. In reaching its conclusion, the Court was obliged to—and did—overrule one California Supreme Court decision precisely to the contrary and disapproved of language "contrary to the views expressed herein" in five later decisions of the California appellate courts. (JS 18a n.12)*

The Court's treatment of the First Amendment issues raised by the case was ostensibly limited to the observation that the First Amendment contentions had, when the case was first argued before the California Supreme Court, "presented an arguable issue" but that this Court's dismissal of appeals in *Suffolk Outdoor Advertising Co.* v. *Hulse,* 43 N.Y.2d 483, 373 N.E.2d 263, 402 N.Y.S.2d 368 (1977), *appeal dismissed,* 439 U.S. 808 (1978) and other cases constituted a firm resolution by this Court "that a prohibition of off-site billboards does not violate the First Amendment." (JS 20a) The California ruling did not deal with or advert to the limited effect that this Court has often stated that its summary dismissals are to be given**

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* The overruled case was that of *Varney & Green* v. *Williams,* 155 Cal. 318, 100 P. 867 (1909). Cases disapproved were *City of Escondido* v. *Desert Outdoor Advertising, Inc.,* 8 Cal.3d 785, 505 P.2d 1012, 106 Cal.Rptr. 172, *cert. denied,* 414 U.S. 828 (1973); *Desert Outdoor Advertising* v. *County of San Bernardino,* 255 Cal.App.2d 765, 63 Cal.Rptr. 543 (4th Dist. 1967), *appeal dismissed,* 393 U.S. 8 (1968); *County of Santa Barbara* v. *Purcell, Inc.,* 251 Cal.App.2d 169, 59 Cal.Rptr. 345 (2d Dist. 1967); *National Advertising Co.* v. *County of Monterey,* 211 Cal.App.2d 375, 27 Cal.Rptr. 136 (1st Dist. 1962); *City of Santa Barbara* v. *Modern Neon Sign Co.,* 189 Cal.App.2d 188, 11 Cal.Rptr. 57 (2d Dist. 1961).

** It has long been clear that while summary affirmances and dismissals are dispositions on the merits, *Hicks* v. *Miranda,* 422 U.S. 332, 344 (1975), they are "not of the same precedential

and did not otherwise directly consider the First Amendment issues raised.

The majority opinion then concluded that the San Diego ordinance did not violate the California equivalent of the

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value as would be an opinion of this Court treating the question on the merits." *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974). *Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 180-81 (1979) ("summary affirmances have considerably less precedential value than an opinion on the merits."). "Indeed, upon fuller consideration of an issue under plenary review, the Court has not hesitated to discard a rule which a line of summary affirmances may appear to have established." *Fusari* v. *Steinberg*, 419 U.S. 379, 392 (1975) (Burger, C.J., concurring).

Inherently, a summary disposition without opinion cannot adequately discuss or explain the issues at hand. "[J]urisdictional statements . . . rarely contain more than brief discussions of the issues presented" and thus cannot serve as a basis for "a conclusive resolution of an important constitutional question. . . ." *Colorado Springs Amusements, Ltd.*, v. *Rizzo*, 428 U.S. 913, 916-17 (1976) (Brennan, J., dissenting from denial of petition for writ of certiorari). Summary dispositions lack "any substantive discussion" of the issues, *Edelman* v. *Jordan*, 415 U.S. 651, 670 (1974), and only affirm the judgment but not necessarily the reasoning of the lower court, *Washington* v. *Confederated Bands and Tribes*, 439 U.S. 463, 477 n.20 (1979) (summary dismissal "does not, as we have continued to stress . . . necessarily reflect our agreement with the opinion of the court whose judgment is appealed. It is not at all unusual for the Court to find it appropriate to give full consideration to a question that has been the subject of previous summary action."). Thus, this Court has often afforded plenary hearing to allow "full opportunity to consider the issue," *Tully* v. *Griffin, Inc.*, 429 U.S. 68, 75 (1976), "raised and decided" by a prior summary affirmance. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 14 (1976).

Finally, summary dispositions have been narrowly interpreted to extend to only "the precise issues presented and necessarily decided," *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977), and "no more may be read into [the Court's] action than was essential to sustain that judgment." *Illinois State Board of Elections* v. *Socialist Workers Party*, *supra* at 183. This case, relating to a total ban on billboards in a major metropolitan area, differs significantly from all prior cases and thus raises distinct and significant constitutional issues.

First Amendment in that it was an appropriate time, place and manner regulation. (JS 20a-21a) Pursuant to that analysis, the court concluded that (a) the ordinance was not content oriented since it related to all outdoor advertising, (b) the ordinance served significant governmental interests of traffic safety and aesthetics, and (c) the ordinance left open adequate alternative means of communication. Recognizing that other forms of communication could be "subjected only to narrowly drawn regulations serving a compelling governmental interest"—a test it did not suggest San Diego could come close to meeting in the instant case—the court held the cases setting forth such principles not to be "controlling." (JS 24a) In distinguishing numerous other means of communication which it (and this Court) had held were protected by the First Amendment, the court concluded that unlike all other means of communication, billboards constituted totally unprotected speech because they were "large, immobile, and permanent." (JS 24a) The court significantly relied on this Court's decision in *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976) in support of its ruling. (JS 24a-25a)

Justice Clark dissented, concluding that the statute "clearly prohibits expression of political, social and commercial thought." (JS 52a) His opinion pointed out that the majority had relied upon a number of cases decided prior to the rulings of this Court affording protection to commercial speech (JS 53a);* that the majority had mis-

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* *Markham Advertising Co.* v. *State*, 73 Wash.2d 405, 439 P.2d 248 (1968), *appeal dismissed*, 393 U.S. 316 (1969); *Murphy, Inc.* v. *Town of Westport*, 131 Conn. 292, 40 A.2d 177 (1944); *Cromwell* v. *Ferrier*, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967); *Howard* v. *State Dep't of Highways*, 478 F.2d 581 (10th Cir. 1973); *United Advertising Corp.* v. *Borough of Raritan*, 11 N.J. 144, 152, 93 A.2d 362, 366 (1952).

read and misperceived this Court's summary dismissal in *Suffolk* (JS 54a, n.1) and that the majority had improperly relied upon a number of entirely distinguishable cases involving billboards. (JS 55a)

Outdoor advertising, Justice Clark concluded, was entitled to First Amendment protection just as were other forms of expression. (JS 55a-58a) The majority opinion, Justice Clark argued, had failed to show that the governmental interests in aesthetics and traffic safety "outweigh[ed] First Amendment rights of plaintiffs, advertisers and the viewing public." (JS 58a) And, relying on the precise terms of the Joint Stipulation of Facts and on other materials, Justice Clark concluded that "[a]dequate alternative means of dissemination of speech are not available." (JS 60a)

Justice Richardson concurred in the judgment, sharing "some of the substantial doubts raised by the dissent of Justice Clark" (JS 48a) but believing himself bound by this Court's summary dismissal in *Suffolk*.

Justice Newman concurred, as well, but noted that he too "share[d] Justice Richardson's unease regarding the prohibition that Justice Clark finds illegal" (JS 48a) and was "not persuaded that this court should defer to city officials' views that one mode of communication in the city should be outlawed because it seems 'particularly unsightly and intrusive'." (JS 49a) However, and notwithstanding his view that "[t]he ordinance here ought to be redrafted" (JS 50a), Justice Newman joined the judgment.

Summary of Argument

The municipal ordinance in question on this appeal would, if enforced, totally destroy the outdoor advertising business in San Diego. That, as the parties have stipulated, is its purpose and that would be its effect. This would occur, notwithstanding the fact that outdoor advertising is a long-recognized and distinct medium of communication which, as the parties have also agreed, is relied upon by many who find other means of communication insufficient, inappropriate and prohibitively expensive.

Part I of this brief outlines the nature of outdoor advertising as a distinct medium of communication; the stipulation of the parties to that effect; the conclusion of Congress to the same effect; and the historical role of the medium. It then urges that, although each medium of communication "must be assessed for First Amendment purposes by standards suited to it," *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 546, 557 (1975), this Court has never countenanced the total destruction of a medium. Cases involving other media are considered and the general conclusion urged that the First Amendment protects the ability of each speaker to choose the medium best suited to his needs.

The decision of *Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U.S. 85 (1977) is specifically relied upon for its holding that, even in the purely commercial speech area (an area afforded less protection than that at issue here), those who wish to speak via one medium may not be deprived of the opportunity to do so in the absence of satisfactory alternatives. In light of the stipulation of the parties that such satisfactory alternatives are lacking here, reversal is urged on this ground as well.

Two arguments of the California Supreme Court are then considered and demonstrated to be inadequate. The contention that outdoor advertising may be destroyed on the ground that it is commercial speech is refuted on the ground that (a) the parties have stipulated that it is, as well, significantly non-commercial in nature and (b) that, in any event, San Diego has utterly failed to meet the standards set forth by this Court in *Central Hudson Gas & Electric Co.* v. *Public Service Commission,* 100 S.Ct. 2343 (1980) which govern such cases. And the purported reliance on a time, place and manner test by the California Supreme Court is responded to by demonstrating (a) that it is a test which, at least as interpreted by the California court, is inherently ill-suited to cases involving the total destruction of a medium and (b) that, even under appropriate time, place and manner analysis the San Diego ordinance cannot be sustained.

Part II of the brief urges that the police power of San Diego does not go nearly so far as to permit an ordinance to destroy this 60 year old communications business. It is first demonstrated that where the loss of constitutional rights is at risk, the exercise of the police power is scrutinized with special care by the courts, the state being obliged to demonstrate a significant public interest furthered by narrowly drawn regulations specifically tailored to accomplish the legislative goal. The special disfavor with which absolute prohibitions are viewed is then explored. The two governmental interests cited in support of the ordinance—traffic safety and aesthetics—are then considered. The failure of San Diego to meet its burden with respect to the first issue is discussed, as is the fact that the record lends no support at all to the thesis that billboards cause traffic accidents. The considerable perils of reliance on the mere invocation of aesthetics to overcome

constitutional values are then considered, as is the utter failure of San Diego to draft a narrow instead of a blunderbuss ordinance.

ARGUMENT

I

The Total Ban on the Medium of Outdoor Advertising Is Violative of the First Amendment.*

At issue on this appeal is the total "elimination", as the parties have stipulated, of a "forum for the communica-

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* There is a suggestion in the majority opinion of the California Supreme Court that appellants lack standing to assert that the San Diego ordinance is facially unconstitutional. (JS 23a, n.14) In fact, both the loss of their right freely to disseminate information and the economic harm appellants will suffer as a result of the ordinance amply afford the requisite "personal stake in the outcome of the controversy" to meet this Court's tests of standing. *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). As was true of the book publishers in *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963), who were seriously affected by a statute effectively coercing distributors to cease the distribution of certain books, appellants will suffer "a palpable injury as a result of the [respondent's] acts alleged to violate federal law. . . ." *Id.* at 64 n.6. And since appellants assert their own right to circulate information (*see Bantam Books, Inc.* v. *Sullivan, supra; Lovell* v. *City of Griffin*, 303 U.S. 444, 452 (1938)), the requirement that a petitioner "assert [its] own legal rights and interests," *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975), has also been met.

Indeed, even in the absence of the direct interest present here, this Court has been so solicitous of free expression rights as to permit "a litigant whose own activities are unprotected . . . [to] challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court." *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620, 634 (1980); *Grayned* v. *City of Rockford*, 408 U.S. 104, 114-21 (1972); *Lovell* v. *Griffin*, 303 U.S. 444, 451 (1938); *Schneider* v. *State*, 308 U.S. 147, 162, 165 (1939); *see also Broadrick* v. *Oklahoma*, 413 U.S. 601, 612-13 (1973); *Bigelow* v. *Virginia*, 421 U.S. 809, 815-17 (1975).

Were there any question whatever as to appellants' standing to challenge the ordinance on its face, it would be laid to rest by

tion of messages to the public," a "means of communication and a media for the expression of ideas." (JS 120a, 123a, 126a, ¶¶ 2, 21, 22(c), 29) The parties to the litigation are not alone in so describing outdoor advertising. Outdoor advertising has been characterized by the United States Congress as one of the nation's separate and distinct "communications media" in the Federal Campaign Communications Reform Act, 47 U.S.C. § 801(1) (repealed 1974). *See also* Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431, 441d (Supp. III 1979).

Signs and billboards have, in fact, been a recognized means of communication for centuries.* Throughout

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application of the "pragmatic considerations" this Court has articulated, in resolving such questions, particularly the impact of the litigation on third party interests. *See Bantam Books, Inc.* v. *Sullivan, supra; Eisenstadt* v. *Baird*, 405 U.S. 438, 445-46 (1972). The California Supreme Court questioned appellants' standing to challenge the inadequacy of alternative means available to various advertisers, stating that such challenges should be brought by the advertisers themselves. (JS 23a, n.14) Such a view ignores, among other things, the stipulated facts which govern this case. As the stipulation states: "Many businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive." (JS 126a, ¶ 28) To suggest that individual advertisers who may be using one or two signs at a time and who do so precisely because other media are too expensive should be looked to to wage what are likely to be long and costly litigations to vindicate their right to advertise on billboards is to close one's eyes to reality. This is particularly so when even a successful "as applied" challenge by an advertiser, as suggested by the California Supreme Court, could do no more than permit the advertiser to erect and maintain a billboard at his own expense, bearing all capital and real estate costs, since currently existing billboards, under the California Supreme Court's decision, likely would long since have been removed.

* Ancient Egyptian obelisks, and even the famous Rosetta Stone carried advertising messages. Agnew, *Outdoor Advertising* ch. 2 (McGraw-Hill Book Co. 1938). In Pompeii, billboard messages were found on "nearly every wall"; similar messages, buried by

American history, billboards have been used as a significant means of expression and communication. *See,* Davidson, *Propaganda and the American Revolution* (Univ. of No. Carolina Press 1941). During the Civil War, the United States Government itself "was one of the heaviest outdoor advertisers" conveying its message with posters "calling for volunteers and offering large bounties" in places which other advertising had been unable to reach. F. Presbrey, *The History and Development of Advertising* 501 (Doubleday, Doran & Co. 1929). In World War I, posters urged upon the public the advisability of American participation. *See* M. Curti, R. Shyrock, T. Cochran & F. Harrington, *An American History* 364 (Harper & Bros. 1950). World War II posters publicized war bonds and requested blood donations. Later social and political uses ranged from the extremely successful "Smokey the Bear" advertisements to those illustrated by the photographs set forth as Appendix I to the Jurisdictional Statement. *See generally* R. Henderson & S. Landau, *Billboard Art* (Chronicle Books 1980) [hereinafter referred to as "Henderson & Landau"].

Commercial billboard advertising began spontaneously in the American colonies with the itinerant sign painter and poster printer practicing his craft learned in England. As one commentator described the phenomena:

> "Notices of sale of farm stock and equipment, county and state fairs, theatricals, circuses, horse races, Fourth of July celebrations, carnivals, and medicine shows constituted the early patrons of the industry.

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the Vesuvius eruptions in 79 A D., called on voters to end graft and corruption. R. Henderson & S. Landau, *Billboard Art* 9 (Chronicle Books 1980). *See generally R. Claus & K. Claus, Visual Environment* (Collier-McMillan Canada Ltd. 1971); M. Gallo, *The Poster as History* (New American Library 1974); Larwood & Hetter, *The History of Signboards* (1866).

> . . . Even though outdoor advertising in the United States had developed without plan or purpose it was so effective that by the close of the War Between the States, there were 275 bill-posting firms employing from two to twenty men each." Tocker, "Standardized Outdoor Advertising: History, Economics and Self-Regulation," in *Outdoor Advertising: History and Regulation* 26-29 (J. Houck ed., University of Notre Dame Press 1969).

Through the years, the nature of commercial advertising on billboards has varied and changed with the times. By 1905, New York was the setting for world-famous electrical advertisements on what was already referred to as The Great White Way; by the late 1920's, with the advent of far better roads and automobile tires than had previously been available, billboards began to be visible throughout the nation. Burma Shave signs, fondly recalled by automobile drivers and their families of the 1930's and 1940's, became a part of American folklore. In the 1950's, hand-painted billboards began appearing with increasing frequency. And, in the years that followed, billboards have continued to reflect and influence American life. *See generally,* Henderson & Landau, *supra.*

The banning of so distinct and historically rooted a medium of communication is inconsistent with a wide range of rulings of this Court relating to other modes of communication. Forms of media differ and, based on their differences, have been treated differently by the courts. Because of the limits of the broadcast spectrum, radio and television have been afforded, in narrow and specified respects, some less protection than the print press. *Compare, Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969) *with Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241

(1974). Motion pictures, while "within the free speech and free press guaranty of the First and Fourteenth Amendments" (*Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495, 502 (1952)), have been subject to official scrutiny prior to public exhibition in a fashion which would be constitutionally intolerable if applied to other media (*Times Film Corp.* v. *City of Chicago,* 365 U.S. 43 (1961)). But each medium has been accorded significant, if not always equivalent, protection.

What these and other cases reflect was succinctly distilled by the Court in *Southeastern Promotions Ltd.* v. *Conrad,* 420 U.S. 546, 557 (1975): "Each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each may present its own problem." Whatever "problems" each distinct medium of communication may pose—and we do not doubt that outdoor advertising raises certain problems unique to it—the one approach uniformly rejected by this Court is that followed by the California Supreme Court in this case: one which recognizes no First Amendment value whatever in the very existence of the medium. The adoption of this approach by the California Supreme Court itself compels reversal.

When analyzing municipal restrictions on leafletting, for example, this Court has presumed distinct value in the medium—precisely what, in fact, the parties have stipulated to as to outdoor advertising. (JS 123a-126a, ¶¶ 21, 22, 23, 28) In *Lovell* v. *City of Griffin,* 303 U.S. 444, 452 (1938), the need to protect leafletting led to the conclusion that the town of Griffin, Georgia could not impose a conditional ban by requiring that an individual obtain a license prior to distribution. In *Schneider* v. *State,* 308 U.S. 147 (1939), absolute bans on handbill distribution were held

unconstitutional notwithstanding claims of municipalities that the aim of the legislation was the prevention of littering. Again, in *Jamison* v. *Texas,* 318 U.S. 413 (1943), this Court decided first that constitutional protection extended to a medium—"the communication of ideas by handbills." *Id.* at 416. It then concluded that "[t]he right to distribute handbills concerning religious subjects on the streets may not be prohibited at all times, at all places, and under all circumstances." *Ibid.**

The same logic has guided the Court when other methods of distributing constitutionally protected information were threatened. In *Martin* v. *City of Struthers,* 319 U.S. 141 (1943), Justice Black isolated those factors which make door-to-door solicitation a protected medium—the fact that "[f]or centuries it has been a common practice"; "[t]he widespread use of this method of communication by many groups"; and its availability and importance to diverse individuals, from those involved with "poorly financed causes" to the government, to convey a variety of ideas. *Id.* at 141, 145-46. A flat prohibition on such solicitation was held unconstitutional. *Accord, Troyer* v. *Town of Babylon,* 483 F.Supp. 1135, 1138 (E.D.N.Y.), *aff'd mem. sub nom. Troyer* v. *Town of Southampton,* 628 F.2d 1346 (2d Cir.), *aff'd,* 49 U.S.L.W. 3371 (U.S. November 17, 1980) ("the Constitution does not allow government to create a rebuttable presumption that people do not wish to be exposed to a particular class of ideas, or mode of expression.")

Again in *Saia* v. *New York,* 334 U.S. 558 (1948), the Court described the unique qualities of sound trucks as a medium—their importance and acceptance as a means of communication. The Court observed that:

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* *See also Hague* v. *Committee for Industrial Organization,* 307 U.S. 496, 518 (1939), in which the Court found an "ordinance absolutely prohibiting such distribution is void."

> "Loud-speakers are today indispensable instruments of effective public speech. The sound truck has become an accepted method of political campaigning. It is the way people are reached." *Id.* at 561.

The Court then concluded:

> "Any abuses which loud-speakers create can be controlled by narrowly drawn statutes. When a city allows an official to ban them in his uncontrolled discretion, it sanctions a device for suppression of free communication of ideas." *Id.* at 562.

One year later, in *Kovacs* v. *Cooper,* 336 U.S. 77 (1949), a divided Court affirmed the conviction of an individual for operating a "loud and raucous" sound truck. Although no opinion commanded a majority of the Court, three members of the majority observed that an "[a]bsolute prohibition" on sound trucks was "probably unconstitutional" (*id.* at 81-82), and three others, concluding that the statute in fact constituted just such "an absolute and unqualified prohibition" of sound trucks, dissented on that ground. *Id.* at 101.*

All of these cases share the common premise that the evident differences between means of communication can neither be ignored nor underestimated; not only is the medium itself sometimes the message,** but the form of

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* Recently, the holding in *Kovacs* was characterized as permitting "the decibels emitted by a sound truck [to] be regulated consistently with the First Amendment. . . ." *Buckley* v. *Valeo,* 424 U.S. 1, 18 n.17 (1976) (*per curiam*). *See also Wollam* v. *City of Palm Springs,* 59 Cal.2d 276, 282-83, 379 P.2d 481, 485, 29 Cal.Rptr. 1, 5 (1963); *Maldonado* v. *County of Monterey,* 330 F.Supp. 1282, 1285 (N.D. Cal. 1971); Recent Cases, 62 Harv.L. Rev. 1228, 1229 (1949).

** *See* M. McLuhan & Q. Fiore, *The Medium is the Message* (Penguin Books 1967); Kaufman, *The Medium, The Message and the First Amendment,* 45 N.Y.U.L. Rev. 761 (1970).

the message can often affect its chance of being presented or accepted in the political, social and commercial marketplace. Consequently, since "words are often chosen as much for their emotive as their cognitive force," *Cohen* v. *California*, 403 U.S. 15, 26 (1971), this Court has g[illegible]rded the speaker's choice of what he considers the most effective means for his communication. The speaker must have the opportunity to "reach the minds of willing listeners and to do so there must be opportunity to win their attention," *Kovacs* v. *Cooper*, 336 U.S. 77, 87 (1949). And for each speaker, a variety of factors, including financial constraints,* desired audience, and the message itself, combine to lead to the choice of a specific medium. In San Diego, this choice may lead police seeking higher pay to greet visitors with a billboard stating "Welcome to San Diego—Home of 1100 Underpaid Cops." (JS Appendix I) It may lead one group to propose by a billboard a boycott of Shell (*id.*), another to seek United States withdrawal from the United Nations (*id.*). There are, to be sure,

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* As the stipulated fact that outdoor advertising is relied upon because other forms of advertising are "prohibitively expensive" indicates (JS 125a-26a, ¶ 28), outdoor advertising is the least expensive of the mass media for advertisers. For the year 1978, for example, the average cost per "rating point" in San Diego for some of the media as publicly set forth in a standard reference guide for advertisers, was as follows: for 30-second commercials on prime-time television, $65.00, and on spot television $38.00; for 30-second commercials on spot radio, $28.00; for one page, black and white ads in weekly magazines, $83.00; for four color ads in monthly magazines, $93.00; and for 600-line newspaper advertisements, $25.00. The average cost per rating point in San Diego for outdoor advertising for a standard, large scale showing for thirty days was, during the same time period, $6.00. "Cost per rating point" is a computation that relates costs to rating point levels—*i.e.*, a percentage indicating the proportion of a particular audience reached by a medium in a particular time frame—and is used by media planners as an indication of relative media efficiency. *Media Market Guide*, San Diego Market Section at 233 (Summer 1978).

other ways to communicate. But they are not the same. For these speakers—and the multitude of commercial users of outdoor advertising—it is no exaggeration to say that there is no meaningful alternative.

It is thus no answer to the constitutional protection afforded each distinct medium simply to assert, as did the majority opinion of the California Supreme Court, that some other medium may be substituted for the one at issue. In *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85 (1977), a case involving more limited First Amendment rights than are involved here because of the totally commercial context of the speech at issue there, the Court, dealing with a town ordinance that prohibited the posting of real estate "For Sale" and "Sold" signs, found that "serious questions exist as to whether the ordinance 'leave[s] open ample alternative channels for communication'. . . ." *Id.* at 93. The Court concluded:

> "[A]lthough in theory sellers remain free to employ a number of different alternatives, in practice realty is not marketed through leaflets, sound trucks, demonstrations, or the like. The options to which sellers realistically are relegated—primarily newspaper advertising and listing with real estate agents—involve more cost and less autonomy than 'For Sale' signs; cf. *Martin* v. *City of Struthers*, 319 U.S. 141, 146 (1943), *Kovacs* v. *Cooper, supra*, at 102-103 (Black, J., dissenting); are less likely to reach persons not deliberately seeking sales information, cf. *United States* v. *O'Brien*, 391 U.S. 367, 388-389 (1968) (Harlan, J., concurring); and may be less effective media for communicating the message that is conveyed by a 'For Sale' sign in front of the house to be sold, cf. *Cohen* v. *California*, 403 U.S. 15, 25-26 (1971).

> The alternatives, then, are far from satisfactory." * *Ibid.*

Other courts have, following *Linmark,* ruled similarly. *See In re Koffler,* —— N.Y.2d ——, N.Y.L.J. Oct. 23, 1980, p. 1, col. 2 at p. 4, col. 4 (holding "ample alternative channels" to direct mail advertising by lawyers unavailable in absence of proof by the state of "comparative costs of the suggested alternatives" or that "the more direct and discursive letter form is not more effective");** *People* v. *Mobil Oil Corp.,* 48 N.Y.2d 192, 397 N.E.2d 724, 422 N.Y.S.2d 33 (1979) (holding ordinance barring posting of signs advertising gasoline price unconstitutional due to lack of sufficient alternative channels for expression).

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* Years prior to this Court's *Linmark* ruling, the California Supreme Court had itself recognized the constitutional dubiety of equating one means of communication with another. In *Wollam* v. *City of Palm Springs,* 59 Cal.2d 276, 284, 379 P.2d 481, 486, 29 Cal.Rptr. 1, 6 (1963), it observed that sound trucks may be, in certain circumstances, the "only practical means for communication of opinion [since] alternative modes of communication, such as radio or television, may be prohibitively expensive, not available, or not effective."

The *Wollam* language is almost identical with that stipulated to by the parties—*i.e.,* that "[m]any businesses and politicians and other persons" rely on outdoor advertising because other media are "insufficient, inappropriate and prohibitively expensive." (JS 126a, ¶ 28) The transformation of this stipulated language by the California Supreme Court to

> "[t]he *possibility* that the ordinance *may* impede an *occasional* advertiser from communicating his message" (JS 23a n.14; emphasis added)

is suggestive of the cavalier fashion with which the binding terms of the stipulation were treated throughout the opinion. *See* JS 60a-61a (opinion of Clark, J., dissenting).

** In *Koffler,* the New York Court of Appeals also observed that "unless the reasonableness of regulation is to be considered in the abstract, a regulation which completely proscribes use of direct mail when the state's purpose can readily be achieved by a less restrictive alternative cannot be said to be reasonable." (*Id.* at p. 4, col. 4)

Nonetheless, the California Supreme Court sanctioned the complete destruction of the medium of outdoor advertising in San Diego. It appears to have bottomed its approach on two distinct premises: first, the thought that only commercial speech was involved here and, second, the notion that the ordinance could be justified as a valid time, place and manner regulation. Neither basis can be sustained.*

The Ordinance Cannot Be Sustained as a Proper Regulation of Commercial Speech

To the extent the ruling was based upon the views of the California court as to the limited protection afforded commercial speech, the opinion simply misses the mark. In this action, as Justice Clark's dissent observes, "the issue before us is not the scope of permissible regulation of commercial thought." (JS 51a) In fact, the stipulation of the parties conclusively establishes that outdoor advertising in San Diego contains "[v]aluable commercial, political and social information." (JS 125a-26a, ¶ 28) Any attempt to support the total "elimination" of outdoor advertising on the ground that all such advertising is commercial is thus based on a conceded inaccuracy.

Moreover, as this Court has recently made clear beyond peradventure, even totally commercial speech, such as that involved in *Linmark,* may not be suppressed unless:

> "[t]he limitation on expression [is] designed carefully to achieve the State's goal. Compliance with this re-

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* These bases apparently were set forth by way of exploration of the permissible reach of the ordinance under the California Constitution's guarantee of free speech, since the California Supreme Court eschewed a First Amendment analysis as such in light of its conclusion, based on a misapprehension of this Court's dismissal of certain billboard appeals, that the case no longer presented an "arguable issue" as to the First Amendment. (JS 20a) *See generally* p. 12, n.**, *supra.*

> quirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive." *Central Hudson Gas & Electric Co.* v. *Public Service Commission,* 100 S.Ct. 2343, 2350 (1980).

The Court further concluded that limitations on commercial speech may be "no more extensive than necessary to further the State's interest," *id.* at 2353, and consequently held unconstitutional an order barring "all promotional advertising, regardless of the impact of the . . . service on overall energy use." *Ibid.*

The language of the Court in *Central Hudson* is, in and of itself, utterly inconsistent with the ruling below. Regulations that flatly ban *all* outdoor advertising—even if all of it were commercial—can hardly survive a legal test which demands that regulation of even commercial speech be shown to be "no more extensive than necessary." San Diego has not sought to bar particular billboards which might be urged to be safety hazards because of their placement; it has not sought to regulate, for aesthetic reasons, the location or concentration of billboards within San Diego's industrial and commercial zones where they currently exist. It has, instead, resorted to the very blunderbuss technique condemned by this Court in *Central Hudson.**

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* Even the case most strongly relied upon in this respect by the majority opinion of the California Supreme Court suggests precisely the opposite conclusion than that for which it is cited.

The Ordinance May Not Be Justified as a Proper Regulation of the Time, Place and Manner of Speech

Reliance by the California Supreme Court on time, place and manner analysis is similarly unsound. To urge that the destruction of a medium can be justified by the simple invocation of the standard tripartite time, place and manner test—content neutral regulation in furtherance of significant governmental interests with ample alternative sources of communication available*—is to ignore the fact that, given the logic of the California opinion, the elimination of any medium could be sanctioned by application of such a test. Any effort to destroy an entire medium could be viewed as content neutral; arguably "significant" governmental interests abound; alternative sources may, by the hypothesis of the opinion below, always be found in the media which remain—*i.e.*, those not "eliminated". If a state sought to prohibit sound trucks, it could be urged that such abolition was content neutral, supported by the significant interests of avoiding noise and enhancing personal privacy, and that alternative sources of expression—such as leaflets or outdoor advertising—were available. If all leaflets were sought to be banned on one aesthetic theory or another, the presence of "other" means of communication could be cited. Precisely the same could

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Young v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976) is cited and relied upon for the proposition that "the city's interest in regulating commercial use of real property outweighed the incidental effect of the ordinance upon First Amendment values." (JS 24a-25a) The opinion totally overlooks the fact that *Young* involved simply a *spacing* regulation—precisely the form of regulation rejected by San Diego in favor of prohibition. *See infra*, pp. 37-38.

* *See, e.g., Consolidated Edison Co.* v. *Public Service Commission*, 100 S.Ct. 2326, 2332 (1980); *Police Department* v. *Mosley*, 408 U.S. 92 (1972).

be said in support of the banning of any medium of communication—until it were the last.*

Moreover, from the face of the San Diego ordinance and the terms of the stipulated facts of this case, the ban at issue here cannot survive any proper application of time, place and manner analysis. For one thing, the parties themselves have stipulated that one element of the classic time, place and manner test cannot be met: there are *no* adequate alternative means of serving the "many businesses and politicians and other persons" whose needs are served only by outdoor advertising and who find other means of advertising "insufficient, inappropriate and prohibitively expensive." (JS 126a, ¶ 28) A review of Appendix I to the Jurisdictional Statement suggests the accuracy of the stipulation.**

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* Professor Ely has pointed out that channels of communication cannot be closed, even in the interest of significant state concerns and even by way of content neutral regulations:

> "the state's interest in keeping the streets and sidewalks clear cannot constitutionally be served by outlawing the distribution of handbills. Here neutrality—an absence of any special restrictions on expression—is not good enough. The state is obligated to protect the channels of communication, even if it takes a special exception and some sacrifice of the state's expression-unconnected interest in clean cities to do it. That there must be some such affirmative obligations is clear. Were the constitutional requirement simply one of neutrality toward expressive conduct, channels of communication such as pamphleteering, picketing and public speaking could effectively be closed altogether, given the state's undeniable interests in keeping thoroughfares clear, and controlling crowds, noise and litter." Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205, 1335-36 (1970).

** In that respect, we commend to the Court the "Brief in Support of Jurisdictional Statement Filed by *Amici Curiae* Who Rely on Outdoor Advertising to Communicate." That brief, joined in by such diverse entities as the California Avocado Commission, the Sheriffs of Los Angeles and San Diego, the First Church of God and the Sickle Cell Anemia Research & Education, Inc., illustrates the absence of adequate alternate means of communication—a fact

The San Diego ordinance, furthermore, can hardly be said to be content neutral. It discriminates on the basis of content by exempting both on-site signs and signs relating to specified subjects—*e.g.*, premises for sale, rent or lease. In effect, only those who own land may use signs to communicate and they are explicitly limited in what they may say. A landowner may advertise products or services which he creates or makes available on those premises; but he may not use signs to advertise those products or services elsewhere, he may not use his own property to advertise the products or services of others, and he may not even use signs on his own land to express his own views on matters not related to his products or services. The difference between the prohibited and the permitted is thus not based upon some content neutral criteria such as size, shape or location; it is strictly based, as it may not be, on content.

As for the governmental interests asserted, the record of this case is utterly barren of *any* support for the proposition that traffic safety has been adversely affected by the existence of outdoor advertising. *See infra,* at pp. 41-43. As for aesthetic considerations (a matter dealt with more extensively at pp. 43-45, *infra*), we need say no more now than that governmental concerns at least as significant have been held insufficient to overcome First Amendment interests. *See, e.g., Linmark Associates, Inc.* v. *Township of Willingboro, supra.* Indeed, if the mere assertion of aesthetic considerations could overcome the First Amendment rights of a medium of communication, more than a few media would be imperiled. Leaflets litter; sound trucks are noisy; newsracks are sometimes unsightly; door-to-door solicitors may well be as intrusive as they are un-

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to which San Diego has stipulated. Of particular interest may be examples of speech which other media refused to carry, but which were set forth on billboards. *E.g., id.* at 5, 7.

welcome. The First Amendment may not be so easily overcome.

II

The Police Power of the City of San Diego May Not Be Interpreted Consistently With the Constitution to Authorize the Complete Prohibition of Outdoor Advertising.

Quite apart from the failure of the California Supreme Court to take account at all of the First Amendment interest in protecting distinct media of communications, itself a sufficient basis for reversal, the ordinance in question could not pass the most rudimentary test applied to assess the propriety of an exercise of the police power which, in destroying a legitimate business, diminishes the breadth and scope of public expression.

Under the decision of the California Supreme Court, a long-standing legitimate business will be "eliminated" across the entirety of San Diego's three hundred and twenty square miles. (JS 120a, 126a, ¶¶ 2, 5, 29, 30) As the parties have stipulated, prior to the enactment of Ordinance No. 10795 outdoor advertising had been conducted in full compliance with all applicable municipal and state laws (JS 122a, ¶ 15) at substantial cost to appellants. (JS 122a, 123a, ¶¶ 16, 18) All of the appellants' billboard displays in San Diego are located in areas zoned for commercial and industrial uses (JS 123a, ¶ 20) and the displays are thus a critical link in the dissemination of goods and services within areas which San Diego itself has zoned for such purposes. Almost sixty per cent of San Diego's citizens are occupied in the manufacturing, retailing, or providing of services (JS 121a, ¶ 10) and San Diego has

itself agreed that the outdoor advertising business provides both direct and indirect benefits to the flow of trade and commerce. (JS 125a-26a, ¶¶ 27, 28) It is in the face of this barrage of stipulated facts, on a record devoid of evidence before this or any other Court that such a flat prohibition is necessary for the accomplishment of any asserted legislative goal, that this case arises.

The police power of the state is broad. *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926); *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590 (1962). It is, of course, subject to limits under the due process clause and other provisions of the federal Constitution. While the California Supreme Court recognized that certain limitations exist, its analysis of the proper limits of the police power was fatally flawed in three distinct respects: it failed, as we have indicated, to give proper recognition to First Amendment considerations and thus incorrectly held that the ordinance carried with it a presumption of constitutional validity; it attached no weight whatsoever to the fact that the effect of the ban at issue here is the total elimination of a decades-old business; and it refused even to consider whether the scope of the ordinance was necessary to accomplish San Diego's asserted goals.

The California Supreme Court held that the standard for judging this legislation was simply whether it sought to accomplish "proper objectives" and, if so, whether the San Diego City Council "could reasonably" believe the instant ordinance would advance those objectives. (JS 6a-7a) Focusing on the two principal interests put forward in the ordinance's preamble—"the elimination of traffic hazards" and the "improvement of the appearance of the City" (JS 7a)—the Court held both traffic safety and aesthetics to be goals properly within the police power of the City. (JS

7a, 9a) It also held "as a matter of law that an ordinance which eliminates billboards designed to be viewed from streets reasonably relates to traffic safety." (JS 7a) It did so without citing anything in the record even suggesting a correlation between the existence of billboards and the incidence of traffic accidents.

Whatever the validity of such an approach to judicial review where narrowly-drawn statutes without impact on distinct constitutional concerns may be involved, this approach can have no application here. This Court has consistently made clear that a state's exercise of the police power must withstand a more exacting review where constitutional values are at issue. *See, e.g., United States Trust Co.* v. *New Jersey,* 431 U.S. 1, 25-26 (1977) (requiring more exacting scrutiny when the contract clause is implicated); *Carey* v. *Population Services International,* 431 U.S. 678 (1977) (requiring more exacting scrutiny when the right to privacy is implicated); *Shelton* v. *Tucker,* 364 U.S. 479 (1960) (requiring more exacting scrutiny when associational freedoms are implicated); *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940) (requiring more exacting scrutiny when religious freedoms are implicated). Again and again, this Court has required such a higher standard when interests such as those at issue here are at stake. As this Court stated in *Schneider* v. *State,* 308 U.S. 147, 161 (1939):

> "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions."

Throughout the years, this Court has articulated the required standard in a variety of ways, in a variety of con-

texts, and in cases involving a variety of proffered governmental interests. What has remained constant, however, has been the Court's insistence that to justify a challenged exercise of the police power in the light of competing constitutional concerns, the reviewing court may not rely on any presumption of validity, but rather must require the *state* to demonstrate a significant public interest, furthered by a narrowly-drawn regulation, specifically tailored to accomplish the legislative goal; should less restrictive means be available, the effort must fail. *See, e.g., Village of Schaumburg* v. *Citizens for a Better Environment,* 444 U.S. 1162 (1980) (state action cannot be sustained unless it serves a sufficiently strong subordinating interest which cannot be served by less destructive means); *Consolidated Edison Co.* v. *Public Service Commission,* 100 S.Ct. 2326, 2334 (1980) (state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest); *Carey* v. *Population Services International,* 431 U.S. 678 (1977) (state interest can only be accomplished by narrowly-drawn statutes furthering compelling state interests). *See also Troyer* v. *Town of Babylon,* 483 F.Supp. 1135 (E.D. N.Y.), *aff'd mem. sub nom. Troyer* v. *Town of Southampton,* 628 F.2d 1346 (2d Cir.), *aff'd,* 49 U.S.L.W. 3371 (U.S. November 17, 1980).

Still more exacting scrutiny is mandated in this case for a separate and distinct reason: the San Diego ordinance is not a mere regulation but an absolute prohibition. This Court has often exhibited its distrust of any such all-encompassing exercise of the police power (*see Talley* v. *California,* 362 U.S. 60 (1960); *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940); *Lovell* v. *City of Griffin, supra;*

Schneider v. *State, supra; Saia* v. *New York, supra*).* This very real distinction between regulation and flat prohibition was explicitly recognized in *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976), the decision so heavily —and, we think, wrongly—relied on by the California Supreme Court. In that decision, both the plurality opinion of Mr. Justice Stevens and the concurring opinion of Mr. Justice Powell noted that the Detroit zoning regulation at issue there was not a flat prohibition on the operation of adult movie theatres within the city. Upholding the ordinance, Mr. Justice Stevens, writing for the plurality, cautioned that:

> "The situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech." 427 U.S. at 71, n.35.

Mr. Justice Powell emphasized, as well, throughout his opinion the fact that the zoning ordinance in question was one that "merely specifies where a theater may locate, and that does not reduce significantly the number or accessibility of theaters presenting particular films. . . ." *Id.* at 81 n.4. But it is precisely such a reduction—in this case to

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* This line of cases was relied upon by the Court of Appeals for the Second Circuit in reversing the dismissal of a challenge to a regulation which prohibited the distribution of newspapers in New York City subways except through licensed newsstands:

> "once appellants have shown a protected interest in speech under the first amendment it is incumbent upon the governmental authority to prove that there is a compelling state interest in its total ban. *Lovell* v. *Griffin*, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938); *Cantwell* v. *Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940); *Cox* v. *Louisiana*, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965). This puts the burden on the governmental authority to establish that nothing less than a total ban would serve this compelling state interest." *Wright* v. *Chief of Transit Police*, 558 F.2d 67, 68 n.1 (2d Cir. 1977).

zero—which is the intended and inevitable result of the San Diego ordinance.

Over the years, state courts, as well, have resisted the notion that the flat prohibition of a business is consistent with the due process clause absent any showing that the activity in question constituted a nuisance *per se*. The Pennsylvania Supreme Court articulated these special concerns in *Exton Quarries, Inc.* v. *Zoning Board of Adjustment*, 425 Pa. 43, 59-60, 228 A.2d 169, 179 (1967):

> "The constitutionality of zoning ordinances which totally prohibit legitimate businesses . . . from an entire community should be regarded with particular circumspection; for unlike the constitutionality of most restrictions on property rights imposed by other ordinances, the constitutionality of total prohibitions of legitimate businesses cannot be premised on the fundamental reasonableness of allocating to each type of activity a particular location in the community. . . . [A] zoning ordinance which totally excludes a particular business from an entire municipality must bear a more substantial relationship to the public health, safety, morals and general welfare than an ordinance which merely confines that business to a certain area in the municipality."

These principles have been applied to set aside various prohibitions on business activities*—including total bans

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* Among the Pennsylvania cases adopting the rationale of the *Exton Quarries* decision are the following, in each of which a flat prohibition on a particular business was rejected: *Beaver Gasoline Co.* v. *Zoning Hearing Board*, 445 Pa. 571, 575-77, 285 A.2d 501, 504-05 (1971) (total ban on gasoline stations; municipality not entitled to rely on presumption of validity of zoning ordinance); *Daikeler* v. *Zoning Board of Adjustment*, 1 Pa. Cmwlth. 445, 452-

on billboards.* They reflect a recognition of what was aptly expressed by the Court of Appeal in the instant case:

53, 275 A.2d 696, 698-99 (1971) (blanket prohibition on off-site advertising signs); *see Norate Corp.* v. *Zoning Board of Adjustment,* 417 Pa. 397, 207 A.2d 890 (1965) (prohibition of all off-site advertising signs); *Appeal of Girsh,* 437 Pa. 237, 263 A.2d 395 (1970) (township-wide exclusion of multiunit apartment buildings); *Appeal of Olson,* 19 Pa. Cmwlth. 514, 338 A.2d 748 (1975) (prohibition of townhouses); *General Battery Corp.* v. *Zoning Hearing Board,* 29 Pa. Cmwlth. 498, 371 A.2d 1030 (1977) (complete ban on waste disposal facilities).

The strict approach towards flat prohibitions is reflected in decisions of other states which have struck down such prohibitions as unreasonable and arbitrary. *U.S. Mining and Exploration Natural Resources Co.* v. *City of Beattyville,* 548 S.W.2d 833, 834 (Ky. 1977) (city-wide exclusion of coal tipples; test is "whether the prohibition of a particular business is necessary to prevent infliction of a public injury"); *Gust* v. *Township of Canton,* 342 Mich. 436, 70 N.W.2d 772 (1955) (prohibition of trailer camps); *Bzovi* v. *City of Livonia,* 350 Mich. 489, 87 N.W.2d 110, 111-12 (1957) (absolute ban on drive-in theatres); *People ex rel. Trust Co. of Chicago* v. *Village of Skokie,* 408 Ill. 397, 97 N.E.2d 310 (1951) (flat prohibition on drive-in theatres had "no firm basis in or relationship" to public welfare); *Reynolds* v. *Vulcan Materials Co.,* 279 Ala. 363, 185 So.2d 386 (1966) (complete prohibition on rock-crushing); *Carter* v. *Town of Palm Beach,* 237 So.2d 130 (Fla. 1970) (elimination of surf-boarding); *Town of Conover* v. *Jolly,* 277 N.C. 439, 177 S.E.2d 879 (1970) (total ban on mobile homes); *Frecker* v. *City of Dayton,* 88 Ohio App. 52, 63, 85 N.E.2d 419, 424 (1949), *aff'd,* 153 Ohio St. 14, 90 N.E.2d 85 (1950) (*per curiam*) (prohibition on sale of ice cream products in parks and on public ways; "no evidence that prohibition as distinguished from regulation is essential to the public welfare"); *Township of Andover* v. *Lake,* 89 N.J. Super. 313, 214 A.2d 870 (App.Div. 1965) (total elimination of junkyards); *Oak Forest Mobile Home Park, Inc.* v. *City of Oak Forest,* 27 Ill.App.3d 303, 326 N.E.2d 473 (1975) (noting that an absolute prohibition of mobile homes is not entitled to presumption of validity).

* Flat prohibitions on billboards have frequently been held to be an unreasonable exercise of the police power: *Combined Communications Corp.* v. *City and County of Denver,* 189 Colo. 462, 542 P.2d 79 (1975); *Norate Corp.* v. *Zoning Board of Adjustment,* 417 Pa. 397, 207 A.2d 890 (1965); *Central Advertising Co.* v. *City of Ann Arbor,* 391 Mich. 533, 551, 218 N.W.2d 27, 35 (opin-

(Footnote continued on following page)

"The ordinance is too broad, too general and too inclusive." (JS 80a) As the Colorado Supreme Court has noted, "the prohibition of an entire industry throughout the entire area of a major city" is of a different character than limitations or prohibitions in small residential communities. *Combined Communications Corp.* v. *City and County of Denver*, 189 Colo. 462, 466, 542 P.2d 79, 82 (1975).* Clearly it may be

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ion dissenting from decision to remand) (1974); *Daikeler* v. *Zoning Board of Adjustment*, 1 Pa. Cmwlth. 445, 275 A.2d 696 (1971); *Central Outdoor Advertising Co.* v. *Village of Evendale*, 54 Ohio Op. 354, 124 N.E.2d 189 (C.P. 1954); *Metromedia, Inc.* v. *City of Des Plaines*, 26 Ill.App.3d 942, 326 N.E.2d 59 (1975); *City of Naples* v. *Polk*, 346 So.2d 1076 (Fla.Dist. Ct.App. 1977); *see also Appeal of Ammon R. Smith Auto Co.*, 423 Pa. 493, 223 A.2d 683 (1966) (prohibition on flashing and intermittent lights on all signs within Township). The decisions cited above demand a close means-end fit between the total exclusion of billboards and advancement of traffic safety and aesthetics; the chronic under-inclusiveness of such ordinances has thus generally proven fatal, especially given the absence of any supported legislative findings that off-premise signs are either less attractive or more hazardous than on-premise signs. *See Daikeler* v. *Zoning Board of Adjustment, supra; Central Outdoor Advertising Co.* v. *Village of Evendale, supra; Metromedia, Inc.* v. *City of Des Plaines, supra.*

* A number of decisions have upheld prohibitions on outdoor advertising. While we believe the approach taken in these cases was, in varying respects, incorrect, it must be emphasized as well that they differ markedly from the present one in that generally they have involved small residential or rural communities. *Cf. Suffolk Outdoor Advertising Co.* v. *Hulse*, 43 N.Y.2d 483, 373 N.E.2d 263, 402 N.Y.S.2d 368 (1977), *appeal dismissed*, 439 U.S. 808 (1978) [Town of Southampton]; *John Donnelly & Sons, Inc.* v. *Outdoor Advertising Board*, 369 Mass. 206, 339 N.E.2d 709 (1975) [Brookline, Mass.]; *Inhabitants of Town of Boothbay* v. *National Advertising Co.*, 347 A.2d 419 (Me. 1975) [Boothbay, Me.]; *Cromwell* v. *Ferrier*, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967) [Wallkill, N.Y.]; *United Advertising Corp.* v. *Borough of Metuchen*, 42 N.J. 1, 198 A.2d 447 (1964) [Metuchen, N.J.]; *United Advertising Corp.* v. *Borough of Raritan*, 11 N.J. 144, 93 A.2d 362 (1952) [Raritan, N.J.]; *Murphy, Inc.* v. *Town of Westport*, 131 Conn. 292, 40 A.2d 177 (1944) [Westport, Conn.]. A single case has upheld a broader statutory prohibition, *John Donnelly & Sons* v. *Mallar*, 453 F.Supp. 1272

in no way analogized to the normal exercise of the zoning power first sanctioned by this Court in *Village of Euclid* v. *Ambler Realty Co., supra.* Such zoning, with which appellants have no quarrel, merely segregates uses according to district while retaining the totality of legitimate uses within municipal boundaries. Nothing of the sort has been done in San Diego.

The California Supreme Court upheld the ordinance on the basis of two governmental interests—traffic safety and aesthetics.* Even assuming that these interests could be deemed, under some circumstances, to meet the level of significance of the standards articulated above, the ordinance cannot withstand review.

At the most basic level, the City has totally failed to demonstrate that the "means" it has chosen are narrowly tailored to serve its proffered goals. The City offered no evidence whatever to support a conclusion that there is a link between traffic accidents in San Diego and billboards.**

(D.Me. 1978), *appeal pending,* No. 79-1575 (1st Cir.) [State of Maine]. That decision is currently on appeal and we believe it to have been wrongly decided.

* These interests are, in fact, difficult to reconcile. As the Oklahoma Supreme Court observed in *Oklahoma ex rel. Dep't of Transportation* v. *Pile,* 603 P.2d 337 (Okla. 1979), *cert. filed,* 48 U.S.L.W. 3699 (U.S. Feb. 11, 1980):

> "[T]he considerations of public safety and beauty as proffered by the state as a basis for prohibiting the speech signified by the defendant's billboard are mutually inconsistent. The argument is made that our residents are entitled to look at the beauty of the countryside, untrammeled by the blight of billboards, in the face of the statement that billboards can be banned because they constitute a distraction to the drivers of automobiles. Using this reasoning, one could argue the countryside should be covered with billboards to reduce the temptation to avert one's eyes from the road." *Id.* at 342-43.

** In its brief to the Court of Appeal, the City relied instead on a number of cases upholding limited restrictions on billboards

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Indeed, what evidence there is suggests the contrary: not a single motorist or pedestrian accident has ever been reported to San Diego as being caused by the existence and maintenance of outdoor advertising signs. (Clerk's Transcript pp. 391-93) Indeed, counsel for the City of San Diego conceded that the "City was unaware of any particular person or any particular instance, fact situation, of someone being injured in an automobile accident because of an outdoor advertising sign." (JA 59a-60a)

Moreover, it is quite impossible to suggest that the enactment constitutes the "least drastic means" of serving the interests of traffic safety as the cases cited above require. It could perhaps be argued that the particular location of a billboard (*e.g.*, on a curve or near a particular intersection) might prove hazardous. But the legislation makes no effort to distinguish real hazards from unreal ones. It is suggested that because billboards solicit public attention they are generally distracting. (JS 7a) By this analysis so, too, is each type of sign exempted from coverage by the ordinance.* Such post-hoc rationalizations

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which it said "demonstrat[ed] that evidence to support this relationship is unnecessary." (Appellants Opening Brief at 13.) Again in the California Supreme Court, the City made clear that it was relying not on any evidence in the record or before the City Council, but on the "presumption of validity of zoning ordinances." Petition for Hearing at 24. However, as demonstrated, such a "presumption" is inapplicable when constitutional interests—such as those involved here—are implicated. When such interests are involved, unsupported claims of traffic safety have not been permitted to carry the day. *See Delaware* v. *Prouse*, 440 U.S. 648 (1979). *See also Craig* v. *Boren*, 429 U.S. 190 (1976). *See generally Troyer* v. *Town of Babylon*, 483 F.Supp. 1135 (E.D.N.Y.), *aff'd mem. sub nom. Troyer* v. *Town of Southampton*, 628 F.2d 1346 (2d Cir.), *aff'd*, 49 U.S.L.W. 3371 (U.S. November 17, 1980).

*It is difficult to understand why signs erected for a governmental purpose thereby pose any less a threat to traffic safety or aesthetic values. Nor is it credible that signs on moving vehicles,

for legislation that is both over and under-inclusive—and therefore clearly ineffective to accomplish its stated goals —simply cannot pass constitutional muster. *See Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 105 (1979); *cf. Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 562, 569 (1976).*

If anything, the justification for "elimination" of outdoor advertising premised on aesthetic values raises still more difficult questions. One need not dispute the proposition that some legislation may properly be based on such values to recognize the risk of allowing such values alone to suffice where conflicting constitutional values are at stake. While this Court has sustained legislation based, in part, on aesthetics (*Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978)), it has not done so in the face of significant First Amendment challenge. Nor has it done so where the legislation in question involved a flat city wide prohibition on particular activity. On the contrary, the Court in *Penn Central* took note of the New York City landmarks designation procedures which provided for an opportunity for individualized evaluation of the aesthetic value in preserving a particular structure as against the competing needs of its owner. *See, e.g., id.* at 112-14; *cf. id.* at 116-17, 136-37. It is pre-

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or public service signs limited to time and temperature are any less dangerous or unattractive. Yet all such signs are exempt from coverage. Indeed, signs on moving vehicles (including signs which provide revenue to San Diego by being placed upon city-owned buses) would appear to pose even greater safety risks to motorists and pedestrians alike.

* Such flaws have been relied upon in invalidating regulations which, like the ordinance at issue here, prohibit, in the interest of "traffic safety", the use of off-premise signs, while permitting the use of on-premise signs. *Metromedia, Inc.* v. *City of Des Plaines*, 26 Ill.App.3d 942, 945-46, 326 N.E.2d 59, 62 (1975); *Central Outdoor Advertising Co.* v. *Village of Evendale*, 54 Ohio Op. 354, 357-58, 124 N.E.2d 189, 194 (C.P. 1954).

cisely the absence of any effort to deal with the specific aesthetic and other interests involved which is one reason the present ordinance is infirm.

There is, as well, a broader problem in permitting the mere invocation of aesthetics to serve as a virtual license to destroy a medium of communication. By their nature, aesthetic judgments relate to matters of taste, tone and mood. Tastes differ. The distaste of one observer for a medium may be matched by the enthusiasm of another.

The final quotation in the opinion of the California Supreme Court—the Ogden Nash verse (JS 47a)—is illustrative of the personal nature of such judgments. One might well compare Nash's views with that of a leading international publication of graphic arts which concluded as follows:

> "Ogden Nash thought that he would never see a billboard lovely as a tree, but he might have changed his mind if he could have seen what is happening now in California. Parallel to the rise of painted walls, an attempt is being made to turn the billboard into Big Art, a movement which recently won recognition, when the California Museum of Science and Industry devoted an exhibition to it." Editor's Note to Rubenstein, *Big Art—The Art of the Billboard,* 34 Graphis, No. 199, at 448 (1978-79).*

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* The artistic importance of billboards and their contribution to the urban landscape has been the subject of a number of recent exhibitions at such other museums as The Renwick Gallery in the Smithsonian Institution, the Los Angeles County Museum and the Museum of the University of California School of Architecture and Urban Planning. *See* Ross, *In Perspective—Los Angeles Environment As Art,* Progressive Architecture 22 (Aug. 1977); Editor's Note to Rubenstein, *supra* at 448 (1978-79); Long Beach Independent Telegram, Mar. 14, 1976. *See also* Nash, "Seaside Serenade," in *The Face Is Familiar* 184, 186 (1940) ["It's each to his taste and a taste to each."]

Of course, we do not suggest that because aesthetic evaluations differ aesthetic judgments cannot be made, let alone that aesthetic values lack meaning or import. But the mere invocation of such values tends to prove too much; it is all but impossible to assess—at least as law assesses matters—judgments which flatly and without fear of contradiction determine that in the eye of the decision-maker one thing or another is ugly or unattractive. Such statements are, in their own terms, irrefutable. But it is precisely this non-rational (hence non-reviewable) quality of aesthetic judgments which signals the need for the closest scrutiny to assure that constitutional rights are not overcome on so subjective and often evanescent a basis.

Far from reflecting the care these concerns should have evoked, the decision of the California Supreme Court took account of none of the limitations on governmental actions set forth above. No weight at all was accorded to the values served by distinct media. No weight was accorded the disfavor with which total prohibitions of businesses have historically been viewed. Nor did the opinion apply the correct legal standards, as required by constitutional principles, to the stipulated facts. The total prohibition on outdoor advertising in the second most populous city of our nation's most populous state cannot be sustained.

CONCLUSION

The decision of the California Supreme Court should be reversed.

Respectfully submitted,

FLOYD ABRAMS
80 Pine Street
New York, New York 10005
(212) 825-0100

Of Counsel:

DEAN RINGEL
SUSAN BUCKLEY
SUSAN E. FINE
MARTHA A. SCARF
CAHILL GORDON & REINDEL

THEODORE B. OLSON
515 South Flower Street
Los Angeles, California 90071
(213) 488-7000

Of Counsel:

WAYNE W. SMITH
GIBSON, DUNN & CRUTCHER

Attorneys for Appellants

November 28, 1980

No. 80-195

IN THE DEC

Supreme Court of the United States

October Term, 1980

METROMEDIA, INC.,

Appellant,

v.

CITY OF SAN DIEGO, a municipal corporation, et al.,

Appellees.

PACIFIC OUTDOOR ADVERTISING CO., INC.,

Appellant,

v.

THE CITY OF SAN DIEGO, a municipal corporation, et al.,

Appellees.

On Appeal From The Supreme Court Of California

BRIEF OF APPELLEES

C. ALAN SUMPTION, Deputy City Attorney
JOHN W. WITT, City Attorney
Litigation Division
233 "A" Street, Suite 300
San Diego, California 92101
Telephone: (714) 236-7221

Attorneys for Appellees

December 1980

INTERIM PRINTING & MAILING COMPANY
1105 WEST MORENA BOULEVARD, SAN DIEGO, CALIFORNIA 92110 — 275-3050

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BRIEF OF APPELLEES

STATEMENT OF THE CASE

1. The Ordinance

On March 14, 1972, the City Council of The City of San Diego adopted Ordinance No. 10795 (New Series)[1] ("the ordinance"), an ordinance prohibiting and abating, with enumerated exceptions, all off-site outdoor advertising display signs in the City of San Diego except for certain circumstances specified in subsection G of the ordinance.[2]

The types of signs excepted from the prohibition of the ordinance, in addition to various governmental, historical, religious, time and temperature, for sale, rent or lease, and signs being manufactured, include: bus bench signs, signs within malls, courts, arcades, etc., not visible from the boundary of the premises, signs on public transportation vehicles, signs on vehicles and trailers, temporary subdivision directional signs under special permit, and temporary political campaign signs.[3]

The ordinance is contained in Chapter X ("Planning and Zoning") of the San Diego Municipal Code and recites as its purpose: to eliminate excessive and confusing signs not related to the premises on which they are located; to eliminate hazards to pedestrians and motorists; to ensure signs are used as identification and not advertisement; to preserve and protect the appearance of the city; to protect the tourist industry by preventing the destruction of the natural beauty and environment of the

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1 Jurisdictional Statement Appendix G (J.S.App.) 104a-118a.

2 J.S.App. 112a-113a.

3 J.S.App. 111a-112a.

city; to safeguard and enhance property values; and to protect public and private investment in buiidings and open space.[4]

2. The Litigation

Appellants, two companies in the outdoor advertising business in San Diego (hereinafter collectively referred to as "Metromedia"), filed actions challenging the validity of the ordinance in the Superior Court against appellees (hereinafter collectively referred to as "City") soon after it was enacted.

The actions were consolidated and each side brought a motion for summary judgment against the other.[5] In addition to a stipulation of facts, the City's motion was also based upon Metromedia's answers to interrogatories, matters subject to judicial notice and declarations pursuant to California law.[6]

The Superior Court denied City's motion for summary judgment and granted Metromedia's, declaring the ordinance invalid and enjoining City from enforcing it.

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[4] J.S.App. 106a-107a.

[5] In California summary judgment procedure is entirely statutory and is governed by Code of Civil Procedure Section 437c. The motion is appropriately granted in a case where no triable issue of fact exists and where the issue is one of law. *Stationers Corp. v. Dun & Bradstreet, Inc.*, 62 Cal.2d 412, 417 (1965); *Loma Portal Civic Club v. American Airlines*, 61 Cal.2d 582, 588 (1964). The moving party has the burden of demonstrating that there is no triable issue as to any material fact and that the opposing party's case is without merit. *Vesely v. Sager*, 5 Cal.3d 153, 169 (1971); *Residents of Beverly Glen, Inc. v. City of Los Angeles*, 34 Cal.App.3d 117 (1973). The motion is to be supported or opposed by affidavits, declarations, admissions, answers to interrogatories, depositions and matters subject to judicial notice. Code of Civil Procedure Section 437c.

[6] Clerk's Transcript (C.T.) 766-776; 1017-1024.

The California Supreme Court reversed the judgment of the trial court and upheld the ordinance as a proper application of municipal authority over zoning and land use for the purpose of promoting the public safety and welfare.

As to the traffic safety objectives sought to be achieved by the ordinance, the California Supreme Court stated: "We hold as a matter of law that an ordinance which eliminates billboards designed to be viewed from streets and highways reasonably relates to traffic safety."[7] The Court further held that the aesthetic objectives of the ordinance were sufficient in themselves to sustain the ordinance.[8]

The decision below also rejected Metromedia's First Amendment attack on the ordinance as well as other asserted illegalities, but agreed with Metromedia in holding that the ordinance is partially preempted by state law as to removal of certain billboards without compensation.[9]

Because the ordinance does not define the term "outdoor advertising display signs" the decision below adopted a narrow construction of the signs proscribed by it by relying on a definition found in the California Revenue and Taxation Code as follows:

> . . . a rigidly assembled sign, display, or device permanently affixed to the ground or permanently attached to a building or other inherently permanent structure constituting, or used for the display of, a commercial or other advertisement to the public.
>
> Cal.Rev. & Tax. Code, Section 18090.2.

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[7] J.S.App. 7a.

[8] J.S.App. 9a.

[9] City's conditional petition for writ of certiorari to review this portion of the decision based upon 23 U.S.C. Section 131 is currently pending in this Court (No. 80-196).

SUMMARY OF ARGUMENT

1. The Ordinance Is A Proper Application Of Municipal Authority Over Land Use And Zoning To Promote The Public Safety And General Welfare

An ordinance restricting land use is valid under the police power if it has a real or substantial relation to public health, safety, morals or general welfare. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1973).

Purposes sought by this ordinance include elimination of traffic hazards and aesthetic enhancement. The Court has held such purposes are within the police power. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 129 (1978); *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 443 (1978).

In arguing that there is no substantial relationship between the ordinance and those objectives sufficient to justify a ban on its business, Metromedia ignores established rules of judicial review of legislation and the record.

Legislation is entitled to a presumption of validity and the burden is on the party attacking it. *Kelley v. Johnson*, 425 U.S. 238, 247 (1976).

The Court has long established a rule of judicial deference to legislative judgment as to what measures are necessary to promote the public good. *Zahn v. Board of Public Works*, 274 U.S. 325, 328 (1927).

Metromedia has not met its burden of proof in challenging the ordinance on due process grounds. Instead it attempts to shift the burden to City by relying on the City's failure of proof. Even if Metromedia is correct in arguing that the burden shifts to City because First Amendment rights are asserted, it has not demonstrated, as it must under California summary judgment law, that there is no relationship between the ordinance and its stated objectives.

Metromedia concedes that its signs are designed to attract the attention of motorists on streets and highways and that they do so. In view of that, the California Supreme Court was correct in concluding as a matter of law that the prohibition of billboards relates to the permissible objective of traffic safety. Other state courts have reached a similar conclusion.

Nor is the fact that the ordinance prohibits Metromedia's type of signs of controlling significance. This Court has not been persuaded by any purported distinction between "regulation" and "prohibition," for any regulation can be so characterized. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 592 (1962).

2. The Ordinance Is A Time, Place And Manner Regulation And Is Not Based Upon Content Of Speech

It is settled that reasonable regulations of the time, place or manner of constitutionally protected speech, where necessary to further significant governmental interests, are permitted by the First Amendment. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 64, n. 18 (1976).

In reviewing such a restriction, the Court has established three criteria: (1) it must be justified without reference to the content of speech; (2) it must serve a significant governmental interest; and (3) it must leave open ample alternative channels for communication of the information. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976).

The subject ordinance does not seek to prohibit any particular message and its objectives are unrelated to content of an advertisement. It is the means of use of billboards (permanent structures and signs adjoining highways to attract the attention of motorists) which is sought to be prohibited.

The signs excepted from the ordinance are used differently than billboards and the exceptions are not based on content of the message.

The Court, while holding that commercial speech is not totally outside of the First Amendment's protection, has not discarded distinctions based on the content of speech. Commercial speech is afforded a lesser degree of protection. *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 455-456 (1978).

Here, although some noncommercial messages are used on billboards, they are merely incidental to a commercial means of exploiting speech.

Billboards have long been recognized by the courts to create special problems and to rely upon a captive audience, thus invading rights of privacy. *Thomas Cusack Co. v. Chicago*, 242 U.S. 526, 529 (1916); *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932).

The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place. *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972).

3. The Ordinance Serves Significant Governmental Interests

The objectives here serve significant governmental interests and the particular term used in describing them is not crucial. *United States v. O'Brien*, 391 U.S. 367, 376-377 (1967).

4. Alternative Channels Of Communication Are Available

City has not stipulated that there are no adequate alternative means of communication. The stipulation was simply intended to mean that in some instances some problems may exist with alternatives.

There are many forms of signs allowed by the ordinance, *e.g.*, on-site signs, bus bench signs, signs within malls and courts and signs on vehicles, in addition to other media.

Cases cited by Metromedia requiring narrowly drawn regulations are inapposite here. Those cases involved more transitory means of communication, not permanent structures and signs. Any regulations which would serve the objectives would in effect render them usable only as the permitted signs which Metromedia claims are inadequate.

ARGUMENT

I

THE ORDINANCE REPRESENTS A VALID EXERCISE OF THE POLICE POWER AND DOES NOT VIOLATE THE FOURTEENTH AMENDMENT

A. The Ordinance Represents A Proper Application Of Municipal Authority Over Land Use And Zoning To Promote The Public Safety And General Welfare

An ordinance restricting land use is valid under the police power if it has a real or substantial relation to the public health, safety, morals or general welfare. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 303 (1926); *Village of Belle Terre v. Boraas, supra*, 416 U.S. 1.

Among the purposes recited to be sought by the subject ordinance are the elimination of traffic hazards and the improvement of the appearance of the city.

This Court has left little doubt that such purposes are proper objectives for the exercise of the police power. *Penn Central Transportation Co. v. City of New York, supra*, 438 U.S. 104, 129; *Raymond Motor Transportation, Inc. v. Rice, supra*, 434 U.S. 429, 443.

Metromedia argues that there is no real or substantial relationship between the ordinance and traffic safety or aesthetics sufficient to justify a flat ban on its business. In doing so, Metromedia ignores established rules of judicial review of legislation and the record below.

Legislation enacted pursuant to the police power is entitled to a presumption of validity and the burden is on the party attacking it. *Kelley v. Johnson, supra*, 425 U.S. 238, 247; *Erie Railroad Co. v. Williams*, 233 U.S. 685, 699 (1913).[10] As was stated in *Kelley v. Johnson, supra*, 425 U.S. 238, 247:

> . . . the question is not . . . whether the State can "establish" a "genuine public need" for the specific regulation. It is whether respondent can demonstrate that there is no rational connection between the regulation . . . and the promotion of [its objectives].

This Court has long ago established a rule of judicial deference to the legislative judgment as to what measures will promote the public health, safety or general welfare, stating with regard to a challenge to a zoning ordinance:

> The most that can be said is that whether that determination was an unreasonable, arbitrary or unequal exercise of power is fairly debatable. In such circumstances the settled rule of this court is that it will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question.
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> *Zahn v. Board of Public Works, supra*, 274 U.S. 325, 328.

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[10] See also *Goldblatt v. Town of Hempstead, supra*, 369 U.S. 590, 596. In connection with legislation having traffic safety as its objective the court has described it as a "strong presumption of validity." *Raymond Motor Transportation, Inc. v. Rice, supra*, 434 U.S. 429, 444, citing *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 524 (1959).

Recently it was stated that the rule in *Zahn* remains viable today. *Moore v. City of East Cleveland*, 431 U.S. 494, 514, n. 1 (1977) (Mr. Justice Stevens concurring).

In applying this rule the Court has stated on many occasions in various ways that it will not go behind the legislative determination and engage in a weighing of the evidence or considerations of necessity:

> Whether the manufacture of oleomargarine . . . involves such danger to the public health as to require . . . the entire suppression of the business, rather than its regulation . . . are questions of fact and of public policy which belong to the legislative department to determine. And as it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts.
>
> *Powell v. Pennsylvania*, 127 U.S. 678, 685 (1888).
>
> . . . courts cannot go behind [the municipal authorities'] finding and inquire into local conditions; or whether the defendant's [pool] hall was an orderly establishment, or had been conducted in such a manner as to produce the evils sought to be prevented.
>
> *Murphy v. California*, 225 U.S. 623, 629 (1911).
>
> Here the demurrer challenges the validity of the statute on its face and it is evident from all the considerations presented to Congress, and those of which we may take judicial notice, that the question is at least debatable. . . . As that decision was for Congress, neither the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted for it.
>
> *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938).

> . . . it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement. . . . It is enough that there is evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.
>
> *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 487-488 (1955).
>
> Unquestionably, there are arguments showing that the business of debt adjusting has social utility, but such arguments are properly addressed to the legislature, not to us. We refuse to sit as a "super-legislature to weigh the wisdom of legislation," . . .
>
> *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963).

In reviewing legislation which is challenged as violating due process under the Fourteenth Amendment this Court has said:

> . . . the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.
>
> *Nebbia v. New York*, 291 U.S. 502, 525 (1933).

More recently the Court has reviewed the scope of judicial review of zoning ordinances and citing the case of *Village of Euclid v. Ambler Realty Co., supra*, 272 U.S. 365, it was stated:

> . . . Mr. Justice Sutherland fused the two express constitutional restrictions on any state interference with private property--that property shall not be taken without due process nor for a public purpose without just compensation--into a single standard: "[B]efore [a zoning] ordinance can be declared unconstitutional, [it

> must be shown to be] clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." . . .
>
> With one minor exception,[2] between the *Nectow* decision in 1928 and the 1972 decision in *Village of Belle Terre v. Boraas* . . . this Court did not review the substance of any zoning ordinances.
>
> *Moore v. City of East Cleveland, supra*, 431 U.S. 494, 515 (Mr. Justice Stevens concurring).

The minor exception cited in note 2 in the above quote is the case of *Goldblatt v. Town of Hempstead, supra*, 369 U.S. 590. Although the Court in *Goldblatt* stated that the validity of the ordinance in question (prohibiting excavations below the water table and requiring the refilling of those that are) may depend upon facts relating to its reasonableness, it concluded that the challenger had not met its burden and upheld the ordinance. In its opinion the Court recited the rule that debatable questions as to reasonableness are not for the courts but for the legislature (at p. 595) and stated that:

> [An] exercise of police power will be upheld if any state of facts either known or which could be reasonably assumed affords support for it.
>
> *Id.* at 596.

In *Moore v. City of East Cleveland, supra*, 431 U.S. 494, the Court reviewed a zoning ordinance which selected only certain categories of relatives which were defined as a "family" and entitled to cohabitate in certain dwellings. The Court held that such legislation intrudes on choices concerning family living arrangements thereby distinguishing the *Belle Terre* and *Euclid* cases stating, "the usual judicial deference to the legislature is inappropriate." (*Id.* at 498-499.) In doing so the Court counseled caution and restraint in utilizing a test of substantive due

process, citing the history of the *Lochner* era. (*Id.* at 502-503.)[11] The Court then determined that although the governmental goals sought were legitimate, it was obvious from the face of the ordinance that the means used had but a tenuous relation to them since the same evils would result from the category of family members which were allowed to live together. (*Id.* at 500.)

Thus, even in those limited instances where the Court has purported to engage in a weighing or balancing analysis it has done so only where it is clear that the legislation had a very slight or no effect in achieving its objectives.[12]

Metromedia has not met its burden of proof in challenging the ordinance on due process grounds. Instead it erroneously attempts to shift the burden to City by relying on the City's failure of proof.[13] Metromedia is simply wrong in its assertion (Jur. Stmt. 25) that the record demonstrates there is no relationship between the ordinance and the traffic safety objective. In support of said assertion Metromedia points to City's response to an interrogatory propounded in discovery proceedings asking for the names of every person known to City who

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[11] Cf. *Andrus v. Allard*, 444 U.S. 51, 68, n. 25 (1979) where the Court refused to exhume a varient of the theory of substantive due process.

[12] See *Delaware v. Prouse*, 440 U.S. 648, 659-661 (1979); *Bibb v. Navajo Freight Lines, supra*, 359 U.S. 520, 524; *Raymond Motor Transportation, Inc. v. Rice, supra*, 434 U.S. 429, 443-444. In each case it was either obvious from the face of the legislation or otherwise made clear that it did not serve to achieve the objectives sought and it is thus questionable that any weighing took place at all.

[13] Nothing in support of Metromedia's motion for summary judgment was offered to demonstrate there was no triable issue of fact on the issue of whether the objectives were served by the ordinance. City asked the trial court to judicially notice commonly known facts with respect to distractions and traffic accidents (C.T. 766-767).

has suffered any physical injury as a result of Metromedia's signs.[14] City's response was to the effect that such information was then unknown.

From this response Metromedia argues that this constitutes a "conceded absence of any factual basis." Obviously such a conclusion does not follow. Because the City did not know of a specific accident related to billboards at the time the answer was given does not mean that such an accident has never occurred or is not likely to occur. Such a relationship may be established by studies, expert opinion or even by commonly known facts. Metromedia also takes City's answer out of context by ignoring City's further response which identifies studies concluding that a causal relationship between billboards and traffic accidents exists.[15]

Furthermore, City would not have been precluded, if the specifics of an accident caused by billboards came to its attention subsequent to its answer to the interrogatory, from using such evidence at trial.[16]

On the other hand, Metromedia has conceded in its answers to City's interrogatories that its signs are designed to, and do in fact attract the attention of motorists on public streets and highways;[17] and, as the California Supreme Court concluded, as a matter of law an ordinance

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14 C.T. 391-393.

15 C.T. 64 and 392, citing "Final Report On The Comprehensive Evaluation of Highway Sign and Billboard Regulations" by Ohio Department of Highways in cooperation with the United States Department of Commerce Bureau of Public Roads (1967) and "A Study of the Relationships Between Advertising Signs and Traffic Accidents on U.S. 40 Between Vallejo and Davis" by D. Jackson Faustman (1961).

16 *Singer v. Superior Court*, 54 Cal.2d 318, 324-325 (1960).

17 C.T. 145-146, 488-489.

which eliminates billboards designed to be viewed from streets and highways reasonably relates to traffic safety.[18]

In *E. B. Elliot Adv. Co. v. Metropolitan Dade County*, 425 F.2d 1141, 1152 (5th Cir. Fla. 1970), cert. den. 400 U.S. 805 (1970), the court reached the same conclusion stating:

> The appellants argue that Ordinance No. 63-26 bears no reasonable relationship to highway safety, relying on the testimony of highway safety experts whose studies revealed no discernible correlation between the placement of outdoor advertising signs along limited access highways, as here involved, and the occurrence of automobile accidents. Even so, we are unable to say that the Board of County Commissioners of Dade County was unreasonable in basing the ordinance, at least partially, on highway safety. The essential purpose of an advertising sign placed adjacent to a highway is to attract the attention of the motoring public long enough to convey a commercial message.
>
> Conceding that the message presented by an average sign can be comprehended by a motorist of average intelligence in an insignificant amount of time, and that eye movement improves the alertness of an expressway driver, the speed and density of modern expressway traffic, coupled with the braking limitations of the modern automobile, can conceivably make even the most insignificant amount of time during which a driver's attention is diverted a matter of direst consequences.

Similarly the court in *Moore v. Ward*, 377 S.W.2d 881, 884 (Ky. 1964) concluded:

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18 J.S.App. 7a.

> . . . Even assuming appellants could produce substantial evidence that billboard signs do not adversely affect traffic safety, this record indicates, and our common knowledge suggests, that the question involves so many intangible factors as to make debatable the issue of what the facts establish. Where this is so, it is not within the province of courts to hold a statute invalid by reaching a conclusion contrary to that of the legislature.[19]

As this Court stated in *Railway Express Agency, Inc. v. People of the State of New York*, 336 U.S. 106, 109 (1949):

> We would be trespassing on one of the most intensely local and specialized of all municipal problems if we held that this regulation had no relation to the traffic problem of New York City. It is the judgment of the local authorities that it does have such a relation. And nothing has been advanced which shows that to be palpably false.

Thus the California Supreme Court was correct in holding that the ordinance serves objectives of traffic safety and improving the aesthetic qualities of the city.

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[19] Other cases in accord: *New York State Thruway Auth. v. Ashley Motor Corp.*, 10 N.Y.2d 151, 176 N.E.2d 566, 568 (1961); *Opinion of the Justices*, 103 N.H. 268, 169 A.2d 762, 764 (1961); *City of Escondido v. Desert Outdoor Adv., Inc.*, 8 Cal.3d 785, 790 (1973); *State of Washington v. Lotze*, 92 Wash.2d 52, 593 P.2d 811, 813-814 (1979), app. dism. 444 U.S. 921 (1979); *Newman Signs, Inc. v. Hjelle*, 268 N.W.2d 741, 757 (N. Dakota 1978); dism. 440 U.S. 901 (1979); *Metromedia, Inc. v. City of Pasadena*, 216 Cal.App.2d 270, 279 (1963) (notwithstanding evidence that billboards were useful and of economic benefit, were less expensive than other forms of advertising, had won art awards, were an accepted use of land and had no measurable causal connection with traffic accidents). Additionally, City requested the trial court to judicially notice commonly known facts relating to distractions and traffic safety which show a relationship between billboards and accidents (C.T. 781). See also Dowds, *Private Signs and Public Interests*, Institute on Planning, Zoning and Eminent Domain, p. 231 (1974).

B. The Ordinance Is Not Invalid Because It Prohibits Appellant's Business

Metromedia attempts to deal with the aesthetic objectives of the ordinance by arguing that such objectives cannot justify a flat ban on its business.[20]

First, it is important to note that Metromedia is incorrect in stating that the ordinance prohibits all outdoor advertising in the City of San Diego. The ordinance applies only to off-site outdoor advertising signs and excepts many types of off-site outdoor advertising signs from its prohibition. Second, contrary to Metromedia's argument, there is no super-added limitation on a valid exercise of the police power that it cannot be utilized to prohibit a business.

Any purported distinction between prohibition and regulation is merely one of words, not substance. In determining whether an enactment constitutes a prohibition or a regulation, the categorization of the subject used as a frame of reference predetermines the conclusion.[21] For example, Metromedia takes the position that "outdoor advertising" is being prohibited, while City contends that the ordinance regulates signs by limiting them to on-site locations[22] and certain types of off-site signs. Any regulation can be characterized as a prohibition to the extent of its proscriptive effect.

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[20] Metromedia also contends that such a rationale is unreasonable and arbitrary. Such arguments have been rejected by this Court. *Penn Central Transportation Co. v. City of New York, supra,* 438 U.S. 104, 132-133; *Powell v. Pennsylvania, supra,* 127 U.S. 678, 686.

[21] See *In the Matter of Cromwell v. Ferrier,* 19 N.Y.2d 263, 225 N.E.2d 749, 752 (1967).

[22] San Diego regulates on-site or business signs through a separate ordinance (San Diego Ordinance No. 11000 [New Series], as amended by Ordinance No. 11718 [New Series] which comprehensively regulates location, type, size, numbers, etc., of signs. See *United Business Commission v. City of San Diego,* 91 Cal.App.3d 156 (1979).

This Court has rejected any such distinction stating:

> . . . Concededly the ordinance completely prohibits a beneficial use to which the property has previously been devoted. However, such a characterization does not tell us whether or not the ordinance is unconstitutional. It is an oft-repeated truism that every regulation necessarily speaks as a prohibition. If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional.
>
> *Goldblatt v. Town of Hempstead, supra*, 369 U.S. 590, 592.[23]

This Court has also upheld prohibitions of businesses in many instances,[24] and several other courts have upheld prohibitions of billboards.[25] Furthermore, such a prohibition may be justified under a

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[23] In accord: *Ferguson v. Skrupa, supra*, 372 U.S. 726, 732; *Breard v. Alexandria*, 341 U.S. 622, 631-632 (1951); *Kovacs v. Cooper*, 336 U.S. 77, 85 (1949); *John Donnelly & Sons, Inc. v. Outdoor Adv. Bd.*, 339 N.E.2d 709, 715 (Mass. 1975).

[24] *Breard v. Alexandria, supra*, 341 U.S. 622, 632-633; *Nebbia v. New York, supra*, 291 U.S. 502, 528, and cases cited in note 26 therein.

[25] *John Donnelly & Sons v. Mallar*, 453 F.Supp. 1272 (Me. 1978), app. doc. No. 79-1575 (1st Cir.); *Suffolk Outdoor Adv. v. Hulse*, 43 N.Y.2d 483, 373 N.E.2d 263 (1977), app. dism. 439 U.S. 808 (1978); *Inhabitants of the Town of Boothbay & State of Maine v. National Advertising Co.*, Me. 347 A.2d 419 (1975); *John Donnelly & Sons v. Outdoor Advertising Bd.*, 369 Mass. 206, 339 N.E.2d 709 (1975); *In the Matter of Cromwell v. Ferrier, supra*, 19 N.Y.2d 263, 225 N.E.2d 749; *United Adv. Corp. v. Borough of Metuchen*, 42 N.J. 1, 198 A.2d 447 (1964); *United Adv. Corp. v. Borough of Raritan*, 11 N.J. 144, 93 A.2d 362 (1952).

public nuisance theory.[26] California Civil Code Section 3479 defines a nuisance as:

> Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property. . . .

California courts have held that billboards may constitute a public nuisance and be prohibited and removed.[27]

Nor is it a valid ground of attacking an ordinance to say that its objectives may be achieved by some means less than a prohibition, for as the court stated in *Hadacheck v. Sebastian,*239 U.S. 394, 413-414 (1915):

> . . . It may be that something else than prohibition would have satisfied the conditions. Of this, however, we have no means of determining, and besides, we cannot declare invalid the exertion of a power which the city undoubtedly has because of a charge that it does not exactly accommodate the conditions, or that some other exercise would have been better or less harsh[28]. . . .

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26 *City of Bakersfield v. Miller,* 64 Cal.2d 93 (1966).

27 *City of Escondido v. Desert Outdoor Adv., Inc., supra,* 8 Cal.3d 785, 790; *People ex rel Dept. Pub. Wks. v. Adco Advertisers,* 35 Cal.App.3d 507, 511 (1973). There also exists authority in support of the proposition that billboard owners do not possess a property right but are seizing for private benefit an opportunity created for a quite different purpose by the expenditure of public money in the construction of public ways. *Packard v. Banton,* 264 U.S. 140, 144 (1923); *General Outdoor Adv. Co. v. Dept. of Pub. Wks.,* 289 Mass. 149, 193 N.E. 799, 808 (1935); *Kelbro, Inc. v. Myrick,* 113 Vt. 64, 30 A.2d 527, 530 (1943); *Moore v. Ward, supra,* 377 S.W.2d 881, 887; *Metromedia, Inc. v. City of Pasadena, surpa,* 216 Cal.App.2d 270, 276-277.

28 See also *Village of Belle Terre v. Boraas, supra,* 416 U.S. 1, 4, quoting from *Village of Euclid v. Ambler Realty Co., supra,* 272 U.S. 365, and *Powell v. Pennsylvania, supra,* 127 U.S. 678, 685.

Furthermore, as will be discussed in the next section, the evils created by billboards cannot be eliminated by lesser means without rendering them ineffective in achieving their intended purpose of reaching thousands of motorists.

II

THE ORDINANCE DOES NOT VIOLATE FIRST AMENDMENT RIGHTS

A. The Ordinance Is A Time, Place And Manner Regulation And Is Not Based Upon Content Of Speech

It is settled that reasonable regulations of the time, place or manner of constitutionally protected speech, where necessary to further significant governmental interests, are permitted by the First Amendment. *Young v. American Mini Theatres, Inc., supra,* 427 U.S. 50, 64, n. 18, and cases cited therein.

Similarly, the Court has held that when speech and nonspeech elements are combined in a course of conduct, an important governmental interest in regulating the nonspeech aspect can justify incidental limitations on First Amendment freedoms. *United States v. O'Brien, supra*, 391 U.S. 367, 376.

In reviewing such a time, place or manner restriction the Court has required that it satisfy three criteria: (1) it must be justified without reference to the content of speech; (2) it must serve a significant governmental interest; and (3) it must leave open ample alternative channels for communication of the information. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, supra,* 425 U.S. 748, 771.

The ordinance here does not seek to prohibit any particular message based upon its content. Its objectives, traffic safety and aesthetics (among others), are unrelated to the subject of an advertisement and are sought to be achieved by prohibiting a particular manner of utilizing outdoor advertising (use of permanent structures and signs adjoining highways to attract the attention of motorists).

This Court in *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 93-94, n. 7 (1977) expressly distinguished regulations to promote aesthetic values or other values unrelated to the suppression of free expression stating:

> . . . we do not decide whether a ban on signs or a limitation on the number of signs could survive constitutional scrutiny if it were unrelated to the suppression of free speech.

Metromedia argues that the ordinance is based upon content because it exempts both on-site signs and signs relating to specified subjects (Br. p. 32).[29] However, these exemptions are not based upon the content of the message but upon the location, type and manner of use of the signs.

On-site signs are linked to specific property and its use. Such accessory uses are utilized differently and are strictly regulated by a separate ordinance.[30] They may also be the only means of identifying a business.[31] Temporary political campaign signs and their supporting

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29 This issue is raised only in the context of the First Amendment. Amicus Pacific Legal Foundation improperly attempts to expand the questions presented by arguing denial of equal protection of the laws (at p. 13). See Jur. Stmt. 8, fn.

30 See note 11, *supra*.

31 The courts have recognized such distinctions between on-site and off-site signs and have rejected attacks against such classification both in the First Amendment and equal protection contexts. *Young v. American Mini Theatres,*

(Footnote 31 continued on page 21)

structures are limited in duration and may not utilize huge permanent structures. The other categories of exempted signs are necessary to carry out governmental functions, or are distinguishable based upon their location, relationship to distracting motorists and permanence.

The Court has recognized that even time, place or manner restrictions may be based upon the content of the speech. "Even within the area of protected speech, a difference in content may require a different governmental response." *Young v. American Mini Theatres, supra,* 427 U.S. 50, 66. The *Young* case also recognized that "the content of a particular advertisement may determine the extent of its protection." (*Id.* at 68.)[32]

In reference to its recent decision (*Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, supra*, 425 U.S. 748) rejecting the notion that commercial speech is wholly outside the protection of the First Amendment, this Court stated:

> We have not discarded the "common-sense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. . . . we instead have afforded commerical speech a limited

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Footnote 31 continued

supra, 427 U.S. 50, 68; *Railway Express Agency, Inc. v. New York, supra,* 336 U.S. 106, 110, 114, 116; *Fifth Avenue Coach Co. v. City of New York,* 221 U.S. 467, 484 (1911); *State of Washington v. Lotze, supra,* 593 P.2d 811, 814-815; *Markham Adv. Co. v. State*, 73 Wash.2d 405, 439 P.2d 248, 256 (1968) app. dism. 393 U.S. 316 (1969); *Metromedia, Inc. v. City of Pasadena, supra,* 216 Cal.App.2d 270, 274; *United Adv. Corp. v. Borough of Raritan, supra,* 93 A.2d 362, 365-366; *E. B. Elliot Adv. Co. v. Metropolitan Dade County, supra*, 425 F.2d 1141, 1154.

[32] See also *Consolidated Edison Co. v. Public Service Com. of New York,* ____ U.S. ____, 65 L.Ed.2d 319, 332-333 (1980) (Justice Stevens concurring); *Carey v. Brown,* ____ U.S. ____, 65 L.Ed.2d 263, 284 (1980) (Justice Rehnquist dissenting).

> measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.
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> *Ohralik v. Ohio State Bar Assn., supra,* 436 U.S. 447, 455-456.

On the other hand, the Court has afforded political campaign speech the utmost constitutional protection. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971).[33]

The underlying reason for the rule prohibiting regulation based upon content of communication is the need for absolute neutrality by the government. The regulation may not be affected by sympathy or hostility for the point of view being expressed.[34]

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[33] See also *Baldwin v. Redwood City,* 540 F.2d 1360 (9th Cir. 1976), cert. den. 431 U.S. 913 (1977) where the court relied upon the nature of election signs, which are temporary and occur infrequently, in invalidating certain restrictions. By excepting temporary campaign signs from the ordinance's prohibition appellant argues it is invalid because based on content and under-inclusive. But the distinction is based upon the nature and mode of utilizing such signs, rather than their content. Furthermore, due to their preferred position, "action by a State taken to observe one prohibition of the constitution does not entail the violation of another." *Packer Corp. v. Utah, supra,* 285 U.S. 105, 109; *Carey v. Brown, supra,* ____ U.S. ____, 65 L.Ed.2d 263, 282 (Justice Rehnquist dissenting). A similar argument that such an ordinance was under-inclusive in view of the objectives sought (traffic safety and aesthetics) because certain signs were permitted was rejected in *State of Washington v. Lotze, supra,* 593 P.2d 811, 814-815. See also *Railway Express Agency, Inc. v. New York, supra,* 336 U.S. 106, 109-110, 112-117.

[34] *Young v. American Mini Theatres, supra,* 427 U.S. 50, 67; *Consolidated Edison v. Public Service Com. of New York, supra,* ____ U.S. ____, 65 L.Ed.2d 319, 327. As stated by Frankfurter, J., concurring, in *Kovacs v. Cooper, supra,* 336 U.S. 77, 97: "So long as a legislature does not prescribe

(Footnote 34 continued on page 23)

Here it is plain that the regulations are content neutral and the distinctions based on the type and mode of use of signs are only indirectly, if at all, related to the content.[35] Here we have a zoning ordinance which regulates land uses (billboard structures) which are unrelated to the property on which they are located and which involve large permanent structures with lasting effects on property, streets and persons.

In *Young v. American Mini Theatres, supra,* 427 U.S. 50, the Court had the opportunity to review First Amendment rights implicated by a zoning ordinance. Mr. Justice Powell, concurring, stated at 76:

> Respondents would have us mechanically apply the doctrines developed in other contexts. But this situation

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(Footnote 34 continued)

what ideas may be noisily expressed and what may not be, nor discriminate among those who would make inroads upon the public peace, it is not for us to supervise the limits the legislature may impose in safeguarding the steadily narrowing opportunities for serenity and reflection. Without such opportunities freedom of thought becomes a mocking phrase, and without freedom of thought there can be no free society."

35 *United States v. O'Brien, supra,* 391 U.S. 367, 382; *Smith v. Goguen,* 415 U.S. 566, 595 (1974) (Justice Rehnquist dissenting). Cf. cases relied on by appellant where restrictions were specifically aimed at suppressing the particular message: *Erznoznik v. City of Jacksonville,* 422 U.S. 205 (1975); *Bigelow v. Virginia,* 421 U.S. 809 (1975); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, supra,* 425 U.S. 748; *Linmark Associates, Inc. v. Township of Willingboro, supra,* 431 U.S. 85; *Carey v. Population Services International,* 431 U.S. 678 (1977); *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977); *Central Hudson Gas & Electric Co. v. Public Service Com.,* ____ U.S. ____, 65 L.Ed.2d 341 (1980). The Court's enunciation of a four-part analysis in *Central Hudson* is applicable where the regulation is based upon content of the speech. Justice Blackmun in his concurring opinion points out that the majority opinion represents a lessening of First Amendment protection to commercial speech by permitting content based regulation if the four part test is met.

> is not analogous to cases involving expression in public forums or to those involving individual expressions or, indeed, to any other prior case. The unique situation presented by this ordinance calls, as cases in this area often do, for a careful inquiry into the competing concerns of the State and the interests protected by the guarantee of free expression.

Similarly Mr. Justice Frankfurter, concurring in *Kovacs v. Cooper, supra,* 336 U.S. 77, 90, 96, voiced concern over use of the phrase "the preferred position of freedom of speech," if it carried the thought that any law touching communication is infected with presumptive invalidity. In that regard he said, after analyzing the Court's First Amendment cases:

> The objection to summarizing this line of thought by the phrase . . . is that it expresses a complicated process of constitutional adjudication by a deceptive formula. . . .
>
> Some of the arguments made in this case strikingly illustrate how easy it is to fall into the ways of mechanical jurisprudence through the use of over-simplified formulas. It is argued that the Constitution protects freedom of speech: freedom of speech means the right to communicate, whatever the physical means for so doing; sound trucks are one form of communication; *ergo* that form is entitled to the same protection as any other means of communication, whether by tongue or pen. . . . The various forms of modern so-called "mass communications" raise issues that were not implied in the means of communication known or contemplated by Franklin and Jefferson and Madison.[36]

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[36] Even if the Court were to agree with Metromedia that a closer scrutiny of the ordinance is warranted because First Amendment rights are asserted or that the burden is upon City to establish that the ordinance is related to the stated objectives, City contends that it has met such a requirement here. See *State of Washington v. Lotze, supra,* 593 P.2d 811, 813 (traffic safety and aesthetics are compelling state interests).

The same principle is applicable here. The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place. *Grayned v. City of Rockford, supra,* 408 U.S. 104, 116. As stated in *Ohralik v. Ohio State Bar Assn., supra,* 436 U.S. 447, 456:

> . . . "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." (Quoting *Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490, 502 (1949).)

Appellant argues that since some noncommercial messages are displayed occasionally on its structures the Court should not construe the First Amendment to afford a lesser degree of protection as it may to commercial speech. In so doing, appellant ignores its unique means of advertising.[37]

Its structures are expensive and permanent, and but for the commercial aspects could not support noncommercial speech.[38] While the commercial nature of billboards may not place them beyond the First Amendment, it is a factor to be considered in the balancing of rights involved. *Breard v. City of Alexandria, supra,* 341 U.S. 622, 642. There exists a distinction between a regulation of speech itself and regulation of a commercial manner of exploiting speech.[39] As stated by

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[37] See Stipulation of Facts Nos. 13, 14, 22, 23, 24, 25 and 31 (J.A. 44a-49a).

[38] Brief of Appellants, 9, fn.; Jur. Stmt. 18, fn.; Amicus ACLU, 17-18.

[39] "[P]rofit-motivated or commercial speech lacks the crucial connections with individual liberty and self-realization which exist for speech generally, and which are central to justifications for the constitutional protection of speech, justifications which in turn define the proper scope of protection under the First Amendment." Baker, *Commercial Speech: A Problem in the Theory of Freedom,* 62 Iowa L.Rev. 1, 3 (1976). See also, *City Wide Prohibition of Billboards: Police Power and the Freedom of Speech,* 30 Hastings L.J. 1597 (1979).

the court in *Railway Express Agency, Inc. v. New York, supra,* 336 U.S. 106, 114, 116 (Justice Jackson concurring):

> That the difference between carrying on any business for hire and engaging in the same activity on one's own is a sufficient one to sustain some types of regulations of the one that is not applied to the other, is almost elementary. . . .
>
> . . . there is a real difference between doing in self-interest and doing for hire, so that it is one thing to tolerate action from those who act on their own and it is another thing to permit the same action to be promoted for a price.

Furthermore, the message on these signs is of a very limited nature, sometimes reduced to a mere picture or brand name.

In sum, billboards are a specialized form of commercial advertising. Occasional displays of a noncommercial nature are merely incidental to a commercial enterprise and are commercially motivated.

As stated in *Packard v. Banton, supra,* 264 U.S. 140, 144:

> The streets belong to the public and are primarily for the use of the public in the ordinary way. Their use for the purposes of gain is special and extraordinary and, generally at least, may be prohibited or conditioned as the legislature deems proper.

Billboards have long been recognized by the courts to create special problems due to their very nature and their intrusive aspects.[40] They have also been recognized to rely upon a captive audience.

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[40] *Thomas Cusack Co. v. Chicago, supra,* 242 U.S. 526, 529; *St. Louis Poster Adv. Co. v. St. Louis,* 249 U.S. 269, 274 (1919); *Packer Corp. v. Utah, supra,* 285 U.S. 105, 110; *State of Washington v. Lotze, supra,* 593 P.2d 811, 812; *Veterans of Foreign Wars v. Steamboat Springs,* 575 P.2d 835 (1978), app.

(Footnote 40 continued on page 27)

> Advertisements of this sort are constantly before the eyes of observers on the streets . . . to be seen without the exercise of choice or volition. . . . Other forms of advertising are ordinarily seen as a matter of choice. . . . The . . . people . . . have those of the billboard thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by one who is to see and read the

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(Footnote 40 continued)

dism. 439 U.S. 809 (1978). As pointed out by the California Supreme Court (J.S. App. A 18a-20a) many decisions have upheld laws prohibiting billboards rejecting First Amendment attacks: *Howard v. State Dept. of Hwys. of Colorado*, 478 F.2d 581 (10th Cir. 1973); *John Donnelly & Sons v. Mallar, supra*, 453 F.Supp. 1272 (D.Me. 1978) app. doc. No. 79-1575 (1st Cir. 1979); *John Donnelly & Sons, Inc. v. Outdoor Adv. Bd., supra*, 369 Mass. 206, 339 N.E.2d 709; *Donnelly Advertising Corp. v. City of Baltimore*, 279 Md. 660, 370 A.2d 1127 (1977); *United Advertising Corp. v. Borough of Raritan, supra*, 11 N.J. 114, 93 A.2d 362; *Stuckey's Stores, Inc. v. O'Cheskey*, 93 N.M. 312, 600 P.2d 258 (1979), app. dism. 64 L.Ed.2d 783 (1980); *Lubbock Poster Co. v. City of Lubbock*, 569 S.W.2d 935 (1978), cert. den. 444 U.S. 833 (1979); *Ackerley Communications, Inc. v. City of Seattle*, 92 Wash.2d 905, 602 P.2d 1177 (1979), app. dism. ____ U.S. ____ (1980); *Markham Advertising Co. v. State, supra*, 73 Wash.2d 405, 439 P.2d 248 (1968), app. dism. 393 U.S. 316 (1969). While some of these decisions predate the Court's recognition that commercial speech is not wholly outside of First Amendment protection, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, supra*, 425 U.S. 748, three recent cases specifically discussed that case in rejecting First Amendment attacks: *Suffolk Outdoor Advertising Co. v. Hulse, supra*, 43 N.Y.2d 483, 373 N.E.2d 263 (1977), app. dism. 439 U.S. 808 (1978); *Newman Signs, Inc. v. Hjelle, supra*, 268 N.W.2d 741, app. dism. 440 U.S. 901; *State of Washington v. Lotze, supra*, 593 P.2d 811, app. dism. 444 U.S. 921.

> advertisement. The radio can be turned off, but not so the billboard. . . .
>
> *Packer Corp. v. Utah, supra,* 285 U.S. 105, 110.[41]

The Court has recognized that there must be a delicate balancing where rights of free speech and privacy clash. *Erznoznik v. City of Jacksonville, supra,* 422 U.S. 205, 208.

As stated in *Kovacs v. Cooper, supra,* 336 U.S. 77, 88-89:

> The preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be insensible to claims by citizens to comfort and convenience. To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself. That more people may be more easily and cheaply reached by sound trucks . . . is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open.

Here, the very nature of the billboard--its location, size and design is such that it is virtually impossible for a motorist to avoid exposure if he chooses.[42]

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[41] *Packer* was cited with approval by the Court in *Lehman v. City of Shaker Heights,* 418 U.S. 298, 302 (1974), relying on the fact that a captive audience was involved there also. In his concurring opinion Justice Douglas stated that a highway was not a public forum for speech and said: "Petitioner overlooks the constitutional rights of the commuters. . . . he has no right to force his message upon an audience incapable of declining to receive it." (*Id.* at 307.)

[42] Cf. *Erznoznik v. City of Jacksonville, supra,* 422 U.S. 205, 211-212; *Bigelow v. Virginia, supra,* 421 U.S. 809, 828; *Consolidated Edison Co. v. Public Service Com. of New York, supra,* ____ U.S. ____, 65 L.Ed.2d 319, 330. The instrusive quality of a billboard is precisely what enables Metromedia to argue that they are a unique means of communication and are very cost

(Footnote 42 continued on page 29)

B. The Ordinance Serves Significant Governmental Interests

As stated previously, the Court has left little doubt that aesthetics and traffic safety are significant governmental interests.[43]

C. Alternative Channels Of Communication Are Available

Contrary to Metromedia's contention, City has not stipulated that there are no adequate alternative means of communication. The stipulation relied on does not state and was never intended to mean that *all* forms of advertising other than Metromedia's are unavailable, insufficient, inappropriate or prohibitively expensive. Certainly some of these problems may exist in relation to some of the alternative means in certain circumstances.[44] For example, expense may be a major factor in

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(Footnote 42 continued)

efficient. Their efficiency is equated to exposure to thousands of motorists (of course exposure does not necessarily mean people are swayed by the message). On the other hand, the nature of temporary political posters in such that they may be avoided by motorists. *Baldwin v. Redwood City, supra,* 540 F.2d 1360, 1367. As stated in *Kovacs v. Cooper, supra,* 336 U.S. 77, 86-87, "The unwilling listener is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it. In his home or on the street he is practically helpless to escape this interference with his privacy by loud-speaker except through the protection of the municipality."

[43] In addition to the authority cited in Section I A herein, see *Young v. American Mini Theatres, supra,* 427 U.S. 50, 62-63, 80; *Village of Belle Terre v. Boraas, supra,* 416 U.S. 1, 5-6; *Berman v. Parker,* 348 U.S. 26, 33 (1954). As stated in *United States v. O'Brien, supra,* 391 U.S. 367, 376-377, the quality of the governmental interest has been characterized by the use of a variety of descriptive terms (compelling, substantial, subordinating, paramount, cogent, strong) which basically mean an "important or substantial governmental interest."

[44] The same is true as to any media when compared to another.

connection with radio, television or national magazine advertising. But it is ludicrous to argue that the expense is prohibitive in connection with leafleting, posters or other outdoor advertising specifically allowed by the ordinance for example.

The Court is capable of taking judicial notice of commonly known facts which dispute Metromedia's interpretation of the stipulation.

The fact that many people rely on billboard advertising does not imply that it is any more effective than alternatives or that they do not also rely upon alternatives.

Furthermore, subsequent to the parties entering into the stipulation the ordinance was amended to add the significant exception of temporary political campaign signs, thereby increasing the types of signs allowed.[45]

Thus the ordinance allows numerous means of communication by signs; *e.g.,* on-site signs, bus bench signs, signs within malls, courts, etc., and signs on vehicles,[46] in addition to other media.

Metromedia also argues that the ordinance cannot be sustained as a time, place or manner regulation because it is a total prohibition of a

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[45] Jur.App. A 3a, n. 1. Appellants miss the point in arguing that this exception is illusory because of the expense involved in erecting a billboard structure (Jur.Stmt. 18, fn.) and that the effect of the ordinance would preclude billboards from being used for noncommercial purposes. This exception was not intended to allow a billboard type sign (huge, permanent structure thrust upon motorists), but is intended to allow a typical campaign sign or poster, temporary in nature and very inexpensive. In fact, a politician may argue that only the wealthy politician can afford a billboard ad.

[46] The California Supreme Court further narrowed the type of signs proscribed by the ordinance by adopting a narrow interpretation of "outdoor advertising display signs." (Jur.Stmt. A 3a-4a, n. 2.)

medium not narrowly drawn and to sanction such would allow the elimination of each alternative medium. (Br. 30-31.)

Metromedia characterizes the manner in which its signs are used as a distinct communications medium and argues City has eliminated a medium of communication,[47] which the courts will not sanction. The cases relied upon are inapposite.

In the sound truck cases cited by Metromedia (Br. 23-24) the Court would not sanction total elimination where the evil could be eliminated through narrowly drafted regulations such as limits on the time of use and noise level. If the Court were to have concluded that under no circumstances could the adverse effects of sound tracks be controlled it certainly would not have saved them on the rationale that they are a medium of communication and can't be eliminated. *Kovacs v. Cooper, supra,* 336 U.S. 77, 85.

Likewise, the leafleting cases are distinguishable in that where littering is deemed to be undesirable, laws may be passed making it illegal to litter, it is transitory in nature and passers-by are not forced to take them. The courts have distinguished between the prohibition of commercial handbills (held unconstitutional in *People v. Remeny,* 40 N.Y.2d 527, 355 N.E.2d 375 (1976)) and the prohibition of all off-site billboards (held valid by the same court in *Suffolk Outdoor Adv. Co., Inc. v. Hulse, supra,* 43 N.Y.2d 483, 474 N.E.2d 263) because of these distinguishing factors.

Here, we have a situation where a permanent structure and sign are forever present, seeking the attention of every motorist at "full volume."

They obviously cannot be regulated as to time, nor degree of ability to attract. In fact, any regulation which diminishes their ability to

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[47] City contends that outdoor signs is the medium. This is another version of the "prohibition versus regulation" argument discussed in Section I B herein.

attract the attention of every one of thousands of motorists at all times of the day and night would reduce their effectiveness to the level of signs allowed by the ordinance and which Metromedia claims are inadequate means of communication. Thus it is the very nature of the beast which makes it such an efficient means of advertising according to Metromedia and its amici,[48] which also necessarily cause the secondary harmful effects sought to be eliminated by the ordinance. The Court has not sanctioned the captive audience means of communication for other media under the guise that it is more efficient, and should not do so here.

It was for this reason that the California Supreme Court found the line of cases relied upon by Metromedia (Br. 22-24) requiring narrowly drawn regulations to not be controlling here, saying:

> Unlike leaflets, newspapers, and the like, a billboard is a large, immobile and permanent structure which like other structures is subject to zoning regulation. The city's right to regulate the commercial use of property, and to ban uses which imperil traffic safety or denigrate the appearance of the community justifies restrictions which go beyond those imposed upon more transitory or less obtrusive media.[49]

Thus, other means of communication may have detrimental effects but they can be regulated. Furthermore, they are temporary and their effects nonlasting, but not so the billboard.

Metromedia also argues that the speaker's choice is important in that he must have the opportunity to reach the minds of willing listeners. (Br. 25.) While the speaker's choice is important, so is the listener's,

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[48] See Brief of Appellant, 25, fn.; amicus Outdoor Advertising Association of America, 7.

[49] Jur.App. A 24a.

especially where he is not willing and has no choice if he uses the public highways and streets.[50]

Nor is the discussion in *Linmark Associates, Inc. v. Township of Willingboro, supra,* 431 U.S. 85, 93, cited by Metromedia (Br. 26) as to adequacy of alternative channels relevant here. In *Linmark* the Court concluded the alternatives were "far from satisfactory" because real estate is not marketed through those other means and is less likely to reach persons seeking the information. Here, however, Metromedia cannot claim that the messages on its billboards cannot or are not in fact customarily conveyed by the alternative channels. Additionally, people do not go out and drive around to obtain information on billboards, especially with today's price of gasoline.

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[50] As cited in *Lehman v. City of Shaker Heights, supra,* 418 U.S. 298, 306, n. 2: "In a survey of motorists in Ohio, 71% expressed the opinion that billboards should be banned from the interstate highway system." See also Dowds, *Private Signs and Public Interests*, Institute on Planning, Zoning and Eminent Domain, 231, 233 (1974).

CONCLUSION

In view of the peculiar nature and use of the billboard, it should be apparent that what is at issue here is not the equivalent of other communications media. We are not dealing with transitory means of communication with minor annoyances of short duration.

The Court should therefore cast a wary eye at standardized formulas in reviewing the First Amendment protection to be afforded to billboards.

The California Supreme Court carefully analyzed the competing interests involved in upholding the ordinance. It is respectfully requested that this Court affirm that decision.

Respectfully submitted,

JOHN W. WITT, City Attorney

By: C. ALAN SUMPTION, Deputy

Attorneys for Appellees

No. 80-195

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

METROMEDIA, INC.,
Appellant,

v.

CITY OF SAN DIEGO, a municipal corporation, and DOES I through XX, inclusive,
Appellees.

PACIFIC OUTDOOR ADVERTISING CO., INC.,
Appellant,

v.

THE CITY OF SAN DIEGO, a municipal corporation, THE CITY COUNCIL OF SAN DIEGO, VOYD BEIGHTS, Zoning Administrator of the City of San Diego and DOES 1 through 10, inclusive,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

REPLY BRIEF OF APPELLANTS

FLOYD ABRAMS
80 Pine Street
New York, New York 10005
(212) 825-0100

Of Counsel:
DEAN RINGEL
SUSAN BUCKLEY
SUSAN E. FINE
MARTHA A. SCARF
CAHILL GORDON & REINDEL

WAYNE W. SMITH
515 South Flower Street
Los Angeles, California 90071
(213) 488-7000

Of Counsel:
GIBSON, DUNN & CRUTCHER

Attorneys for Appellants

February 17, 1981

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* The information required by Rule 28.1 of the Court is set forth at page 2, n.* of Appellants' Brief.

In the

Supreme Court of the United States

October Term, 1980

No. 80-195

Metromedia, Inc.,

Appellant,

v.

City of San Diego, a municipal corporation, and Does I through XX, inclusive,

Appellees.

Pacific Outdoor Advertising Co., Inc.,

Appellant,

v.

The City of San Diego, a municipal corporation, The City Council of San Diego, Voyd Beights, Zoning Administrator of the City of San Diego and Does 1 through 10, inclusive,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

REPLY BRIEF OF APPELLANTS

Introduction

A. *The Issues Not Raised*

It is well to begin with what this appeal is not about. It is not about the constitutionality of municipal or state

laws regulating the spacing or placement of outdoor advertising, nor of efforts to restrict outdoor advertising to specific areas or to preclude it from others of special scenic beauty or historic character. In fact, California has itself adopted legislation, the constitutionality of which appellants do not question, designed to control outdoor advertising without destroying it.*

Nor does this appeal place in constitutional jeopardy any federal legislation. Congress has itself taken no action requiring the removal of outdoor advertising in any commercial or industrial zone in the country.** Indeed,

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* California has expressly recognized that outdoor advertising "is a legitimate commercial use of property adjacent to roads and highways [,] . . . an integral part of the business and marketing function, and an established segment of the national economy, and should be allowed to exist in business areas, subject to reasonable controls in the public interest." Cal. Bus. & Prof. Code § 5226 (West 1974). California's "reasonable controls" include restrictions on individual signs which are found to constitute traffic hazards [Cal. Bus. & Prof. Code §§ 5403(b), (d), (e), (f), (g) and (h) (West 1974), 5404 (West 1974) and 5408(b) and (c) (West Supp. 1980)]; standards for the structural integrity of signs [Cal. Bus. & Prof. Code § 5401 (West 1974)]; limits on sign size [Cal. Bus. & Prof. Code § 5408(a) (West Supp. 1980)]; spacing restrictions [Cal. Bus. & Prof. Code § 5408(d) (West Supp. 1980)]; restrictions on obscene displays [Cal. Bus. & Prof. Code § 5402 (West 1974)]; and limits on lighting [Cal. Bus. & Prof. Code § 5408(b) (West Supp. 1980)]. The state also has a detailed permit procedure [Cal. Bus. & Prof. Code § 5350 *et seq.* (West 1974 & Supp. 1980)] and requirements for compliance with zoning restrictions [Cal. Bus. & Prof. Code §§ 5320-25 (West 1974)].

** The Federal Highway Beautification Act is, in fact, explicit in providing that localities are *not* obliged to "control" billboards within the very industrial and commercial zones which are at issue here. *See* 23 U.S.C. § 131(d) (Supp. III 1979). This legislative determination is consistent with the expressed conclusion of Congress that "outdoor advertising is an integral part of the business and marketing function and an established segment of the national economy; as a legitimate business, it should therefore be allowed to operate where other industrial and commercial activities are conducted." Report of the Senate Committee on Public Works, S. Rep. No. 709, 89th Cong., 1st Sess. 6 (1965). The Johnson Administration, which introduced the legislation, voiced similar views: "The criteria to be followed in setting the standards for billboards

forty-seven of the fifty states have relied upon legislation which, like California's, regulates outdoor advertising without requiring the destruction of the entire medium of communication.* And no city in the nation of or near San Diego's size and industrial and commercial nature has enacted any prohibition on outdoor advertising of the breadth or scope of that in effect in San Diego.

B. *The Ordinance at Issue*

The case comes to this Court on stipulated facts.** Whatever violence San Diego may seek to inflict upon the lan-

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in both zoned and unzoned areas, designated as commercial or industrial, would be designed to assist the advertising industry to achieve an orderly development of this important and legitimate business enterprise." Letter of J. Connor, Secretary of Commerce, Report of the House Committee on Public Works, H.R. Rep. No. 1084, 89th Cong., 1st Sess. 4 (1965). As summarized by Federal Highway Administrator, L. Bridwell, "The Highway Beautification Act of 1965 . . . specifically recognizes the rightful place of outdoor advertising by stating it shall be permitted and, in fact, promoted within zoned and unzoned commercial and industrial areas . . . ." Hearings On a Review of the Highway Beautification Act Before the House Subcommittee on Roads, 90th Cong., 1st Sess. at 938 (May 2, 1967).

* The only exceptions are Maine, Vermont and Hawaii which have filed a brief, *amici curiae*, in this Court. The Maine statute was held unconstitutional in *John Donnelly & Sons* v. *Campbell*, No. 79-1575 (1st Cir. December 22, 1980) based upon its ban of outdoor advertising containing "ideological" speech. While a similar flaw afflicts the San Diego statute, we urge upon the Court the concurring opinion of Judge Pettine which persuasively articulates why the Maine—or San Diego—statute would be inconsistent with the First Amendment even if limited to purely commercial advertisements. In fact, in this action San Diego has acknowledged that "but for the commercial aspects" of the outdoor advertising business, "noncommercial speech" could not be sustained. Brief of Appellees at 25 [hereinafter "S.D. Br."].

** The Joint Stipulation of Facts is set forth as Appendix H to the Jurisdictional Statement at page 119a. It is also set forth in the Joint Appendix commencing at page 41a. References to "JS....a" are to appropriate pages of the Appendix to the Jurisdictional Statement; references to "¶...." are to appropriate paragraphs of the Joint Stipulation.

guage of the stipulation (*see infra* at 6-7, 10-11), it does not take issue with the proposition that it is bound by it. *Richfield Oil Corp.* v. *State Board of Equalization,* 329 U.S. 69, 73 n.1 (1946); *Gonzales* v. *Pacific Greyhound Lines,* 34 Cal.2d 749, 755, 214 P.2d 809, 813 (1950). It does not quarrel with the proposition that under California law, courts themselves are bound by the stipulation. *Bechtel Corp.* v. *Superior Courts,* 33 Cal.App.3d 405, 411-12, 109 Cal.Rptr. 138, 142 (5th Dist. 1973); *Greatorex* v. *Board of Administration,* 91 Cal.App.3d 54, 58, 154 Cal.Rptr. 37, 39 (4th Dist. 1979). It has not petitioned for relief from the stipulation. *See People* v. *Trujillo,* 67 Cal.App.3d 547, 136 Cal.Rptr. 672 (5th Dist. 1977); *Richfield Oil Corp.* v. *State Board, supra.* It does not and could not claim that any basis exists for denying the stipulation the full credence routinely accorded such documents by this Court. *See, e.g., Allstate Insurance Co.* v. *Hague,* 49 U.S.L.W. 4071, 4076 (U.S. January 13, 1981) (No. 79-938); Appellants' Brief at 3, n.* [hereinafter "App. Br."].

Nothing in the opinion of the California Supreme Court changes the relevant facts, as stipulated to by the parties.* The definition by the California Supreme Court of "outdoor advertising displays," relied upon by San Diego to narrow the sweeping statutory prohibition, provides that the statutory ban applies to all rigidly assembled signs permanently affixed to the ground or attached to buildings which constitute or are "used for the display of a commercial *or other* advertisement to the public." (JS 4a-5a, n.2)

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* Nor does the amendment to the ordinance enacted after the stipulation, so as to allow temporary political campaign signs. (San Diego Municipal Code ch. X, art. I, § 101.0700 F(12); JS 112a) The amendment is not only discriminatory in favoring one kind of speech over all others (*see* Brief *Amicus Curiae* of the American Civil Liberties Union at 12-16) but, as San Diego itself acknowledges, was not intended to permit even billboards which contain campaign advertisements to continue to survive. (S.D. Br. at 30, n.45)

(emphasis added). Whatever the ambiguity of the court's definition, it remains indisputable that:

—the scope of the ordinance sweeps beyond purely commercial advertising displays;

—*no* off-premise billboards displaying non-commercial advertisements of the sort included in Appendix I to the Jurisdictional Statement are lawful under the ordinance;

—*no* off-premise billboards displaying commercial advertisements are lawful under the ordinance;

—*no* on-premise billboards containing advertisements of any sort, except those that relate to products made or sold or services provided on-premises are lawful under the ordinance.*

It is this ordinance which is before this Court for review.

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* The opinion of the California Supreme Court does permit display of on-premise "picket sign[s] announcing a labor dispute or a small sign placed in one's front yard proclaiming a political or religious message." (JS 4a, n.2) It does not permit the display, even on one's own premises, of billboards setting forth political and social messages such as are set forth in Appendix I to the Jurisdictional Statement. Nor does it permit the display on one's own property of *any* advertisements, commercial or non-commercial in nature, setting forth the views of others.

ARGUMENT

I

The Destruction of the Medium of Outdoor Advertising Is Inconsistent With the First Amendment.

In our main brief, we pointed to the constitutional disfavor with which any effort to destroy distinct media of communications has historically been viewed by this Court. Unable to quarrel with this submission, San Diego devotes a good deal of effort in its brief to a kind of linguistic legerdemain which seeks to evade the plain meaning of the facts to which it has stipulated. Having defined the nature and functions of "outdoor advertising" with precision in the stipulation (JS 123a, 124a, 125a-126a, ¶¶ 21, 23, 28), having recognized the distinction between such advertising and on-site advertising (JS 123a-124a, ¶ 22), having set forth how outdoor advertising is purchased (JS 124a-125a, ¶ 24) and how it is presented (JS 125a, ¶ 25), and having stipulated that the San Diego ordinance would result in *"eliminating outdoor advertising within the City of San Diego"* (JS 126a, ¶ 29),* San Diego now argues (S.D. Br. at 16) that appellants' so-called "position" that " 'outdoor advertising' is being prohibited" is inaccurate.

To the extent that this argument is premised upon the contention that since "on-site" signs may remain in San Diego the medium of outdoor advertising will survive, it simply ignores the fact that the two differ in their very nature and purpose. Outdoor advertising is, at its essence, a medium which is available to all-comers for the display of all their messages. On-site displays, by their nature, deal only with the businesses, goods or services available on the property on which the sign is located; they are not intended or understood to be available for communication generally. (JS 123a-124a, ¶¶ 22, 22(d))

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* Emphasis added.

Similarly, to the extent the argument is bottomed upon the minor exceptions contained within the ordinance which allow advertising on bus benches, arcades and the like, the argument simply ignores the historic and definable characteristics of outdoor advertising—*i.e.*, easily visible signs, in standardized sizes, the copy of which customarily changes monthly, which are made available to all and are usually purchased on the basis of a presentation requiring multiple exposure. (JS 123a-125a, ¶¶ 22-25)

It is, in short, "outdoor advertising" as historically understood (and defined by the parties) that is "a means of communication and a media for the expression of ideas." (JS 123a, ¶ 21) That is the "outdoor advertising" that was recognized by Congress as one of the nation's "communications media." *See* App. Br. at 19. It is that that the San Diego ordinance seeks to "eliminate." (JS 120a, 126a, ¶¶ 2, 29)*

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* Outdoor advertising has, as well, been recognized as a separate medium in the very source relied upon by the United States to demonstrate its supposed insignificance. (Brief for the United States as *Amicus Curiae* at 5, n.8; 27-28, n.28 [hereinafter "U.S. Br."]) According to the United States, since the document entitled "Advertising—Estimated Expenditures by Medium: 1965-1978", Bureau of the Census, U.S. Department of Commerce, *Statistical Abstract of the United States* 595 (1979) concludes that "only" 1.1% of total advertising expenditures were spent on outdoor advertising in 1978, the "volume of advertising reaching the public will not be significantly diminished by further restrictions on billboards." (U.S. Br. at 27-28, n.28) Passing the question of whether $465 million (in 1978) is so self-evidently modest a sum as it is apparently viewed by the United States, the reliance upon the 1.1% figure proves both more and less than is constitutionally tolerable. For example, the same study indicates that "only" 2.7% of advertising expenditures were expended on all weekly magazines, 1.7% on all monthly magazines, .4% on all network radio advertising and .2% on all farm publications. It would surely be a quixotic constitution that would allow the destruction of such forms of communication based upon their limited size. Moreover, the suggestion that because 1.1% of advertising dollars is expended on outdoor advertising the number of advertisers is small, is simply inaccurate. If anything, the figure reflects the fact that outdoor advertising is *less* expensive than other forms of advertising. (*See* App. Br. at 25 n.*; *see also* JS 125a-126a, ¶ 28.)

The suggestion that the elimination of outdoor advertising can be justified constitutionally because such advertising provides information that some members of the public would prefer not to receive is at the heart of San Diego's submission. (S.D. Br. at 26-28) But our system is premised on the notion that one may use the power of language and speech to convey a message—even an undesired message—in the hope of persuading the reader or listener. This Court has recognized the special nature of the privacy interest each individual has with respect to his home; this exception to the general principle has never been held to sanction so complete a ban on exposure to a variety of messages as the ordinance would compel in the interests of avoiding "obtrusiveness". *Compare Cohen* v. *California,* 403 U.S. 15 (1971) and *Spence* v. *Washington,* 418 U.S. 405 (1974) *with FCC* v. *Pacifica Foundation,* 438 U.S. 726 (1978) and *Rowan* v. *United States Post Office Department,* 397 U.S. 728 (1970). *See also Erznoznik* v. *City of Jacksonville,* 422 U.S. 205 (1975).*

Acceptance of such a ban would go far to ensuring that individuals are exposed only to messages they wish to receive at times and in places they choose to receive them.**

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* Indeed, even when the asserted state interest of preserving residential privacy has been raised, this Court frequently has held the benefit of the free dissemination of ideas to outweigh any assertions of intrusiveness as justification for regulation. *Village of Schaumburg* v. *Citizens for a Better Environment,* 444 U.S. 620 (1980); *Consolidated Edison Co.* v. *Public Service Commission,* 100 S.Ct. 2326 (1980); *Carey* v. *Brown,* 100 S.Ct. 2286 (1980). *See Troyer* v. *Town of Babylon,* 483 F.Supp. 1135 (E.D.N.Y.), *aff'd mem. sub nom. Troyer* v. *Town of Southampton,* 628 F.2d 1346 (2d Cir.), *aff'd,* 49 U.S.L.W. 3371 (U.S. Nov. 17, 1980).

** In a similar vein, the United States argues that since outdoor advertising displays are erected along highways, no comparison can be made with "streets" recognized to be historically dedicated to public communications in *Hague* v. *Committee for Industrial Organization,* 307 U.S. 496, 515 (1939) (Opinion of Roberts, J.).

Such an approach is consistent neither with the First Amendment nor with the belief undergirding it in both the power of communication and the ability of our citizenry to make choices for themselves—when they are informed.

Nor can San Diego's reliance (S.D. Br. at 6, 26-28) on early opinions of this Court referring to the allegedly "intrusive" nature of billboards be sustained. Not one decision relied upon even considered First Amendment arguments. Indeed, in the only case cited decided after the First Amendment was deemed applicable to the states (*Packer Corp.* v. *Utah,* 285 U.S. 105 (1932)), the First Amendment was neither urged by counsel nor determined by the Court.* And, of course, *Packer* itself pre-dated by over four decades this Court's decision affording First Amendment protection to commercial as well as non-com-

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(U.S. Br. at 23-24) If the United States is attempting to distinguish "highways" from "streets", it has overlooked the fact that the very thoroughfares involved here are those of the commercial and industrial zones of San Diego. There is nothing in the record to suggest that San Diego's thoroughfares are of a different character than those involved in *Hague.*

In any event, the California Vehicle Code fails to support the distinction. The term "highway" is defined as "a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel." Cal. Veh. Code § 360 (West 1971). Lest there be any question that "highway" means "street", the Code continues, "[h]ighway includes street." *Id.* And, as if to avoid any debate on the point, that "[s]treet includes highway." *Id.* at § 590 (West 1971).

* *See Cammarano* v. *United States,* 358 U.S. 498, 513 n.* (1959) (Douglas, J., concurring). As Justice Douglas noted there:

> "In *Packer Corp.* v. *Utah,* 285 U.S. 105, the First Amendment problem was not raised. The extent to which such advertising could be regulated consistently with the First Amendment (cf. *Cantwell* v. *Connecticut,* 310 U.S. 296; *Martin* v. *Struthers,* 319 U.S. 141; *Breard* v. *Alexandria,* 341 U.S. 622; *Roth* v. *United States,* 354 U.S. 476) has therefore never been authoritatively determined."

mercial speech in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

There is, in short, no First Amendment authority which can justify the total destruction of the medium of outdoor advertising. San Diego's blunderbuss ordinance is at odds with the very principles which give life to the First Amendment.

II

None of the Arguments Advanced by the City and *Amici* Supports the View That the Ordinance Is a Valid Regulation of the Time, Place and Manner of Speech.

Whether this case is viewed as one involving commercial speech, non-commercial speech, or more appropriately, a mixture of both, the arguments advanced by San Diego and its *amici* do not support the view that the ordinance can stand as a valid time, place and manner regulation.*

Since the record conclusively demonstrates that one of the three elements of the time, place and manner analysis—the existence of adequate alternative means of communication—simply cannot be met, that should end the inquiry at the outset. Apparently San Diego and the *amici* who support it recognize this to be the case, for their efforts to avoid the stipulated facts are little short of frenzied. The fact remains that the parties have agreed that:

> "Valuable commercial, political and social information is communicated to the public through the use of out-

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* Neither the City nor its *amici* have addressed themselves to the fact that the application of time, place and manner analysis is ill-suited to a situation in which the effect of the state's action is to eliminate an entire medium. *See* App.Br. at 30-31. We will not repeat that analysis here except to refer the Court to the well-reasoned and, we believe, persuasive concurring opinion of Judge Pettine in *John Donnelly & Sons* v. *Campbell*, No. 79-1575, *supra*, slip op. at 22-27.

> door advertising. Many businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive." (JS 125a-126a, ¶ 28)

Explanations of the stipulation range from the incomprehensible ("The fact that many people rely on billboard advertising does not imply that it is any more effective than alternatives . . .")* to the condescending ("[i]t is understandable that a busy under-budgeted litigator would enter into such a stipulation . . .")** to the insulting.*** Notwithstanding all, the stipulation affords ample basis for reaching the same conclusion as that set forth by this Court in *Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U.S. 85, 93 (1977): *i.e.* "serious questions exist as to whether the ordinance 'leave[s] open ample alternative channels for communication' . . ." and—at the very least—that other options "may be less effective media for communicating the message. . . ."†

The ordinance fails to satisfy the requisites for a legitimate time, place and manner standard in still another distinct fashion since it can hardly be considered content neutral. While San Diego argues that the ordinance does not seek to prohibit any message based on content in that its objectives "are unrelated to the subject of an *advertisement*" (S.D. Br. at 20)‡, it ignores the fact that, as the phrasing of the brief itself reveals, the ordinance's purpose, as stated in its preamble, was, *inter alia,* to promote

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* S.D. Br. at 30.

** Brief *Amici Curiae* of the City of Alameda, *et al.* at 18, n.14.

*** *See* Brief *Amicus Curiae* of the City and County of San Francisco at 18, n.12.

† *See generally* Brief in Support of Jurisdictional Statement Filed by *Amici Curiae* Who Rely on Outdoor Advertising to Communicate.

‡ Emphasis added.

the use of signs for identification and to *eliminate* their use for advertising. Section 10.1.0700 of the ordinance provides in pertinent part:

> "A. Purpose and Intent
>
> > "It is the purpose of these regulations to eliminate excessive and confusing sign displays which do not relate to the premises on which they are located; . . . to ensure that signing is used as identification and not as advertisement . . . ." (JS 106a)

Thus the ordinance explicitly distinguishes among signs on the basis of their message.* Whether viewed as a content-based distinction or as one based on subject matter, the result under decisions of this Court is the same: such a distinction may not be the basis for such a regulation. *Consolidated Edison Co.* v. *Public Service Commission,* 100 S.Ct. 2326 (1980); *see also Carey* v. *Brown,* 100 S.Ct. 2286 (1980).

The United States proffers two arguments in support of its assertion that the San Diego ordinance is content neutral; both are totally unresponsive to the issue. It argues, first, that the ordinance does not discriminate on the basis of content because "it is the billboard itself that is objectionable." (U.S. Br. at 29) But as Judge Pettine noted:

> "[I]n fact, people do not put up billboards simply for the sake of erecting objects along the roadways. As a practical matter, billboards do not have a purpose and meaning apart from their potential for speech." *John Donnelly & Sons* v. *Campbell,* No. 79-1575, slip op. at 21-22 (1st Cir. December 22, 1980) (Pettine, J., concurring).

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* Other ways in which the ordinance departs from content neutrality—its discrimination between editorial and other political messages and the content-based exemptions it authorizes—are discussed in our initial brief at 32.

Indeed, elsewhere in its brief, the United States is quick to point out that it is the billboard's "message" which makes it so particularly intrusive. (U.S. Br. at 11)

The United States next argues that the ordinance should not be viewed as an impermissible restriction based on content because it is a restriction based on place. This argument, as well, misses the mark. If this were so, how is it that a property owner may not use his own billboard to advertise the opening of a new store down the block? Why may he not use it to demonstrate his support for San Diego's "underpaid cops" (*see* J.S. App. I)? Why may election signs be erected temporarily but other temporary signs, including signs related to political and social issues uninvolved in an election, not be?

Both together and separately, the exemptions for on-site identification signs and temporary election signs confirm the content-based aim of the legislation and demonstrate that the ordinance "undeniably discriminates 'between lawful and unlawful conduct based upon the content of the . . . communication.'" *John Donnelly & Sons* v. *Campbell*, No. 79-1575, slip op. at 22 (1st Cir. December 22, 1980) (Pettine, J., concurring) quoting *Carey* v. *Brown*, 100 S.Ct. 2286, 2290 (1980).

III

The Invocation of the Police Power Is Insufficient to Justify the Ordinance.

San Diego and the *amici* who support it have taken great pains to detail the scope of the police power, its application to zoning and land use regulation, and the propriety of its exercise in furthering the goals of traffic safety and aesthetics. (S.D. Br. at 7-15; *see* U.S. Br. at 9-17) While many of the principles there urged would be unexceptionable in the absence of the competing constitutional concerns raised in this case, they can hardly be viewed in the analytical vacuum urged by San Diego.* Appellants' challenge to San Diego's all-engulfing exercise of the police power has always been premised on the fact and bottomed on the view that, at the very least, a significant speech component is at issue here. (*See* App. Br. at 34-36.)

The fact that the ordinance would totally eliminate outdoor advertising is entitled to particular weight in assessing the proper scope of the police power. *See* App. Br. at 35-41. *And see John Donnelly & Sons* v. *Campbell, supra,*

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* This approach is perhaps best illustrated by the brief of the United States. It states:

> "Appellants do cite (Br. 36-38) this Court's decision in *Young* v. *American Mini-Theatres, Inc., supra,* for the proposition that a total ban on activity raises special constitutional concerns. But *Young* and the other decisions of the Court relied upon by appellants all arose under the First Amendment, one of the 'specific constitutional limitations' on the exercise of the power." (U.S. Br. at 17, n.18)

We are somewhat at a loss in responding to such an argument since it is precisely that "specific constitutional limitation" which is involved in this case. Although the brief of the United States thereafter refers the reader to its subsequent discussion of the First Amendment issues raised by this case (*id.*), such an approach simply ignores the fact that the scope of the police power cannot be evaluated in the abstract, but must be measured by reference to competing "constitutional limitations."

slip op. at 24-27 (Pettine, J., concurring). However, even apart from this extraordinary—and, we believe, decisive—aspect of this case, San Diego has still utterly failed to bear its burden of demonstrating that the ordinance is a "precisely drawn means of serving a compelling state interest." *Consolidated Edison Co.* v. *Public Service Commission,* 100 S.Ct. 2325, 2334 (1980).*

With respect to the plainly significant goal of traffic safety, San Diego simply has not begun to demonstrate that the scope of the ordinance is necessary to the achievement of that goal or, indeed, that the ordinance furthers that goal at all. *See* App. Br. at 41-43. As the opinion of the Court in *John Donnelly & Sons* v. *Campbell, supra,* concluded:

> "The statute's condemnation is universal, regardless of the nature of the ways, of the extent of the unimpeded view, and of particular traffic conditions. In the interest of workable enforcement some overbreadth is permissible, but the disparity here seems far from minimal. Moreover, we can think of no reason to believe that the signs which the statute permits will be any less distracting than some of those that are prohibited. The contrary may well be supposed. Vehicular signs, permitted under the statute, have long been recognized as posing traffic safety problems. *See Railway Express Agency, Inc.* v. *New York,* 1949, 336 U.S. 106, 109. Other types of signs are permitted because they are deemed particularly important, *see* n. 4, ante; these, too, would seem particularly distracting. Finally,

* The test articulated in *Consolidated Edison* is particularly appropriate here since the speech at issue there, as here, contained both non-commercial and commercial aspects. To the extent San Diego has suggested that this Court's opinion in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission,* 100 S.Ct. 2343 (1980) provides a more appropriate standard for analyzing the protections afforded purely commercial speech, we have previously demonstrated that the ordinance cannot withstand analysis under the tests set forth in the Court's opinion in that case, let alone those articulated in the concurring opinions. *See* App. Br. at 28-29.

> and significantly, on-premise signs seem far greater traffic hazards than signs conveying information for future use. One need hardly ask which is more likely to disturb the traffic pattern, a sign that advertises that some product or service is available ahead, or one that causes the passenger or driver to exclaim that the spot is just being passed.
>
> "The fact that the statute may retain some dangerous signs and leave some that are not is not determinative, but does diminish the overall importance, from the standpoint of safety, of the restrictions effected. Concededly the purpose of all signs is to attract attention, and it must be that they generally do so or plaintiffs could not operate. *Moore* v. *Ward*, Ky., 1964, 377 S.W.2d 881, 886. Nevertheless, it does not follow that the prohibited signs pose a significant threat to highway safety; the record before us strongly suggests the contrary. We hold on the present record that highway safety is not a sufficient ground, standing alone, to support so broad a statute, and we have doubts whether it is even a strong contributing factor." *Id.*, slip op. at 10-11.*

San Diego's brief does not address the problems inherent in invoking aesthetic goals to justify the ordinance here. *See* App. Br. at 43-45. In fact, it does not address its interest in improving the appearance of the City at all. The arguments of *amici* who do address the question illus-

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* San Diego's brief itself reflects the contradiction which the First Circuit found so intolerable. Although on the one hand, it urges that signs which can be viewed from the street pose a special danger to traffic safety (S.D. Br. at 13-14), on the other it urges that advertisers can communicate with travelers by the use of on-site signs, bench signs and signs on vehicles. (S.D. Br. at 30) And *compare* U.S. Br. at 16 ("Billboards identifying a commercial site or advertising activities there . . . typically are more permanent displays to which motorists might become accustomed over time . . .") with *id.* at 17 ("On-premise signs often are also essential for informational purposes to enable the motorist to locate the commercial establishment.").

trate that it is simply insufficient as a basis for the total elimination of a communications medium.

Amici argue that the elimination of billboards is necessary to preserve scenic phenomena and natural beauty. The City and County of San Francisco urges, for example:

> "[I]t is difficult to imagine how a reasonable person could conclude that a series of 12 by 24 foot structures, irrespective of what is painted on them, is more aesthetically pleasing than a view of such natural and man-made scenic phenomena as the Golden Gate Bridge, Coit Tower or the San Francisco Bay . . ." Brief *Amicus Curiae* at 12 n.8.

And the brief, *Amicus Curiae,* of the National Institute of Municipal Law Officers comments on the "unique aesthetic needs" of South Lake Tahoe, California, a city "'situated in a scenic mountain-forest-lake with a reputation as a restful resort community.'" *Id.* at 10. But whatever else may be said of this case, it does not involve settings such as are so evocatively, if irrelevantly, portrayed by the *amici.*

We are told that "residents of or visitors to commercial and industrial areas should be entitled, to the extent possible, to the same benefits of an aesthetically pleasing environment that individuals in other areas enjoy." (U.S. Br. at 12) To some extent, this argument appears bottomed on the wish that commercial and industrial areas were, in fact, neither commercial nor industrial. It is, as well, inherently inconsistent with the decision of San Diego to permit on-site outdoor advertising to remain in the 2.8% of San Diego that is zoned for commercial and industrial uses and is at issue here. (JS 123a, 121a, ¶¶ 20, 9) More broadly, it assumes what cannot be assumed: that the societal interest in preserving a "means of communication and a media for the expression of ideas" (JS 123a, ¶ 21) is entitled to *no* weight whatever when juxtaposed against

the assertion of aesthetic values. That is not the theory upon which the Federal Highway Beautification Act was based.* And, as Judge Pettine concluded, it is surely inconsistent with the First Amendment:

> "In undeveloped areas, it may very well be that signs and billboards are the principal eyesores; here, the benefit will be great, for their removal would return the landscape to its pristine beauty. In industrial and commercial areas, however, signs and billboards are but one of countless types of manmade intrusions on the natural landscape. Without denying that some perceptible change for the better would occur even here, I question whether the margin of improvement obtained in these areas can really justify the state's decision to virtually eradicate commercial speech by sign and billboard. *Cf. Schneider* v. *New Jersey*, 308 U.S. at 162-63. If any one, consistent thread runs through First Amendment jurisprudence, surely it must be the recognition that the preservation of free expression is neither easy nor comfortable. It often requires of us that we tolerate things we would rather not see and endure things we would rather not hear. It requires that we accept a less-than-perfect world—a world that is not as quiet, as neat, as refined, or

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* Indeed, that Act itself reflects a careful balancing between aesthetic concerns and the need to maintain adequate means of communication. *See supra*, page 2, n.**. It is noteworthy that in its brief, *amicus curiae*, submitted to this Court in *Oklahoma* v. *Pile, petition for cert. pending*, No. 79-1617, the United States, in the course of criticizing the Oklahoma Supreme Court's rejection of traffic safety as a rationale for the Oklahoma law, observed that "[t]he [Oklahoma] court thereby ignored the common-sense basis for the distinction between commercial or industrial zones, where signs do not stand apart from the landscape and command attention, and rural areas bordering highways, where the impact of such signs is more substantial." Brief of the United States as *Amicus Curiae* at 15 (filed August 15, 1980). It is that distinction, supported by "common-sense" as well as constitutional principles, which the United States totally ignores in its current brief.

> even, I believe, as scenic as we might like." *John Donnelly & Sons* v. *Campbell, supra,* slip op. at 35 (Pettine, J., concurring) (footnotes omitted).

If, in fact, the price of a world "as scenic as we might like" is as high as that required by San Diego, it is constitutionally exorbitant. Such a world, necessarily and inevitably, would be one in which the scope and variety of public expression would be significantly diminished. It is not a price the First Amendment permits San Diego to exact.

CONCLUSION

The decision of the California Supreme Court should be reversed.

Respectfully submitted,

FLOYD ABRAMS
80 Pine Street
New York, New York 10005
(212) 825-0100

Of Counsel:

DEAN RINGEL
SUSAN BUCKLEY
SUSAN E. FINE
MARTHA A. SCARF
CAHILL GORDON & REINDEL

WAYNE W. SMITH
515 South Flower Street
Los Angeles, California 90071
(213) 488-7000

Of Counsel:

GIBSON, DUNN & CRUTCHER

Attorneys for Appellants

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In the Supreme Court of the United States

No. 80-195

METROMEDIA, INC., et al.,
Appellants,

vs.

CITY OF SAN DIEGO, et al.,
Appellees.

On Appeal from the Supreme Court of California

BRIEF IN SUPPORT OF APPELLEES FILED BY AMICUS CURIAE CITY OF ALAMEDA, CITY OF HAYWARD, CITY OF LA MESA, CITY OF ORANGE, CITY OF REDWOOD CITY, CITY OF WALNUT CREEK, CITY OF VALLEJO CITY OF HUNTINGTON BEACH

CARTER J. STROUD
City Attorney
City of Alameda
City Hall, Room 314
Alameda, California 94501
Telephone: (415) 522-4100

INTER-CITY PRINTING COMPANY, OAKLAND, CALIFORNIA 94607

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In the Supreme Court of the United States

October Term, 1980

No. 80-195

METROMEDIA, INC., et al.,
Appellants,

vs.

CITY OF SAN DIEGO, et al.,
Appellees.

BRIEF IN SUPPORT OF APPELLEES FILED BY AMICUS CURIAE CITY OF ALAMEDA AND OTHER CITIES LISTED HEREIN

STATEMENT OF INTEREST

The City of Alameda has for almost seven years been engaged in litigation to enforce its off-premise advertising ordinance. While the ordinance is different from the one before this court the issues raised and addressed in the Alameda litigation have been the same. Moreover, Alameda has other cases pending, not related to billboards, which present similar issues. Alameda presented the amicus curiae brief on behalf of many California cities in the state ac-

tion. Many of those cities have joined in this brief. They are listed on the signature page. Most of them have ordinances similar to San Diego's ordinance.

SUMMARY OF ARGUMENTS

The First Amendment Issue: The First Amendment does not guarantee the right to sell advertising space on extremely large signs placed at the most obtrusive locations. The San Diego ordinance, as construed by the California Court, only applies to billboards.

Appellants' business is not synonymous with outdoor advertising. There are other existing forms exempted by the ordinance. More importantly, there is a plethora of other devices available to carry the messages now seen on these large structures.

If this court determines that a billboard mode of outdoor advertising must be permitted as well as the other forms of outdoor advertising, this court need only limit the application of the ordinance to signs 12 x 24 feet and larger. Invalidating the ordinance entirely would be miscontrued as an indication that no regulation of billboards can succeed.

This issue should be decided by reference to the prospective application of the ordinance. Amortization is not a First Amendment issue.

The Due Process Issue: The due process clause does not afford appellants vested rights to maintain their

nonconforming structures. Amortization provides a reasonable resolution between private losses and public benefits. Eminent domain "taking" concepts are inapplicable, and in the context of this case contrary to the sound public policy. Experience gained over the years by legislative bodies is not outlawed or made prohibitively expensive by the Constitution because it takes the form of changes in zoning laws.

ARGUMENT

THE FIRST AMENDMENT ISSUE

I.

INTRODUCTION

The conflict between outdoor advertising in the form of billboards and public health, safety and welfare dates at least to the turn of the century. *In re Wilshire* (S.D. Cal. 1900) 103 F. 620. The character of billboards and the arguments advanced by their promoters have changed very little. One early case described them thusly:

> "Speaking generally, plaintiff's business consists of outdoor advertising, displayed at conspicuous points and places and by means of pictures, signs and letters. The more conspicuous and public the place the greater is the desire to cover it with that class advertisements. The privacy of the home, places of public resort, retreats for rest and recreation, seats of learning and even the sanctity of the church are as much within

> the shadow of the structure hereinafter described as are the vacant lots and commanding views along the public thoroughfares of the City. The walls and roofs of many residences and business houses are not exempt from this intrusion. While all kinds of business and merchandise are advertised by this means of display, yet observation and common experience teach us that probably the greater percent thereof proclaim the newest and choicest brands of liquors, tobacco, cigars and cigarettes, and announcements of various plays which are to be presented at the various theaters." *St. Louis Gunning Advertising Company* v. *City of St. Louis* (1911) 235 Mo. 99, 137 S.W. 929, 941, app. dism. 34 S. Ct. 325.

Many of the arguments made today against ordinances regulating billboards were made in the *St. Louis Gunning* case and rejected by that court. Seven years later this Court followed that decision. *St. Louis Poster Advertising Co.* v. *City of St. Louis* (1919) 249 U.S. 269. Mr. Justice Holmes even implied that the exclusion of billboards would not violate the Constitution. The mode of constructing billboards at that time was such that they were dangerous to the physical well-being of pedestrians and a sanctuary for filth and crime. Long after this Court had approved ordinances which eliminated the more obvious health, safety and blight problems associated with billboards, the promoters of this industry were still asserting a "constitutional right . . . to conduct their

business of outdoor advertising as they had been accustomed without interference by the enforcement of rules and regulations adopted by defendants." *General Outdoor Advertising Co.* v. *Department of Public Works* (1935) 289 Mass. 149, 193 N.E. 799, 808, app. dism. 56 S. Ct. 495. The *General Outdoor Advertising* case is still the basic primer on the subject of billboards. *John Donnelley & Sons* v. *Mallar* (Me. 1978) 453 F. Supp. 1272 brings it up to date. *See*, also, 81 ALR3d 486. Most of the arguments made today by the industry were discussed there and rejected. The extensive fact finding review made by the court still applies to many of the effects of billboards today and those few arguments against regulation which the court approved (based on the aesthetic limitations) no longer lie.

Although the more blatant adverse effects of billboards have been eliminated by regulations, their more subtle adverse effects have either been overlooked or attempts to regulate them have been frustrated by earlier decisions which would not recognize more aesthetically oriented police power objections. *See, Varney & Green* v. *Williams* (1909) 155 Cal. 318, reversed by the case at bench. Those decisions are no longer viable.

The more subtle effects of billboards have become more obvious as they continue to increase in size and number.[1] They have become the biggest artifact

[1] *Metromedia, Inc.* v. *City of Pasadena* (1963) 216 Cal.App.2d 270, hear. den., app. dism., 84 S. Ct. 636, recognized the "nuisance fostered by billboards . . ." at p. 276.

seen in any city that did not have the good sense not to permit them at the outset. They dominate skylines and overpower messages from smaller businesses and information signs. They congregate in certain locations to an extent that they become the principal item in the visual landscape of that area. In short, in many areas, all other functions of the city, from a visual standpoint, have become secondary to an incidental, if not non-functional, aspect of any city's architecture, the advertising of certain consumer items. These consumer items are usually advertised by identical ads in stores, transit systems and (except for liquor and cigarettes) radio and television. The imbalance or out-of-focus or out-of-scale or even ugly effect of this lack of proportion in form and function tends to give many people a feeling of uneasiness about their environment. Must we be cajoled into buying something everywhere we go? Many cities are trying to return a sense of proportion to their streets.

> "Of all private signing, billboards most frequently conflict with the needs of the public. They skew communications systems so that local information is obscured and particular destinations are made more difficult to find. Unlike most other advertising, billboards cannot be turned off or ignored at will. They are thus a direct violation of the individual's privacy for someone else's profits.

"Billboards located adjacent to complex, high volume urban highways and at major intersections are a safety hazard because they distract the driver's attention. In historic districts, such as those in Boston, the case against billboards and other large signs is clear. It is equally clear in residential areas. Businessmen in some shopping areas have taken joint action to remove billboards because they detract from local character. Arguments like those which apply to protection of natural scenery might also be made for protection of the city skyline from dominance by advertisements.

"There is a growing public concern with these supersigns. In order to preserve views of the natural landscape, the federal government now provides incentives for outlawing billboards along interstate highways. The State of Vermont has done away with them altogether on the grounds that they are bad for the tourist industry as well as highway safety. Many small cities, self-conscious about the appearance of their local environment, have passed anti-billboard ordinances."

"City Signs & Lights," MIT Press, Copyright 1973, p. 12.

The term aesthetics embraces much more than personal preference. One's values, indeed the values of society, are expressed aesthetically.[2] Americans have invested billions on the most inefficient kinds of automobiles, raincoats that are not waterproof

and all manner of non-functional items for no other reason than aesthetics.

All the thoughtful design which an architect can lavish on a building, or a tree crew on street trees, goes for naught by juxtapositioning them with billboards. If the apologists of billboards do not see aesthetic damages caused by those structures it is unfortunate that action was not taken sooner. Apparently the damage has already been done. The Bull Durham signs that were once painted on the roofs of barns have become monolithic steel structures blocking out the sky, seen from countless intersections traveled by millions of people. Man changes the environment only to have the changed environment change him. One of those changes is an ever increasing insensitivity to that environment.[3] If appellants' arguments are accepted by this Court that cycle will continue. If nothing else, years of more delays will result from a reversal. The Constitutional right sought here is the right to maintain large *structures*, immune from the normal exercise from the police power, simply because they have had messages pasted on them for a period of years. Reversal would give, at least, the appearance that the court accepts that theory. Such a decision would create manifest difficulties even for those cities which have adopted narrower ordinances and better records.

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[2] In Biblical terms, man does not live by bread alone. Joshua 8:3 and Matthew, Chapter 4, Verse 4.

[3] In this regard a total ban on the present "billboard" form (usually 300 sq. ft. and larger) is the only remedy. *See*, Jurisdictional Statement, p. 26.

II.

EXTENSIVE REGULATION HAS BECOME THE RULE

It is now valid national policy to eliminate billboards from the view of those locations where they are most effective: the national (and states) freeway systems. 23 U.S.C. 131; *Markham Advertising Co.* v. *State* (1968) 73 Wash.2nd 405, 439 P.2d 248, app. dism., 393 U.S. 316; *Stuckey's Stores, Inc.* v. *O'Cheskey* (1979) 600 P.2d 258; app. dism., 64 L. Ed.2d 783; and *State of Washington* v. *Lotze* (1977) 92 Wash.2d 52, 593 P.2d 811, app.dism., 100 S. Ct. 257.[1] Extensive and exclusionary regulations have been sanctioned over the years. *Lubbock Poster Co.* v. *City of Lubbock* (1978) 569 S.W.2d 935, cert. den., 100 S.Ct. 63; *Suffolk Outdoor Advertising Co.* v. *Hulse* (1928) 43 N.Y.2d 483, 402 N.Y.S.2d 368 app. dism., 439 U.S. 808; *Newman Signs Inc.* v. *Hjelle* (N.D. 1978) 268 N.W.2d 741, app. dism., 99 S. Ct. 1205; *Veterans of For. Wars Etc.* v. *Steamboat Springs* (1978) 575 P.2d 835, app. dism., 439 U.S. 809; *Ackerley Communications, Inc.* v. *City of Seattle* (1979) 92 Wash.2d 905, 602 P.2d 1177, app. dism., ...U.S.....; *Art Neon Co.* v. *City and County of Denver* (10th Cir. 1973) 488 F.2d 118, cert. den., 94 S.Ct. 2644 and those cases cited *infra*. Unquestionably, the regulation of the size, height and location of signs constitutes a valid time, place and manner exercise of the police power. All of these cases sanction significant limitations on locations all the way from zon-

[1]That is the policy of the State of California also. Bus. & Prof. Code Sec. 5226.

ing district bans to city or state and even national systems bans. In many the application of or exemptions to the ordinance does not permit the "characterization of a "total ban" but total bans are discussed and approved in *Steamboat Springs*,[5] *Art Neon*[5] and *Suffolk, supra.*

We will, therefore, limit our discussion here essentially to the total ban claim on the assumption that this Court is not prepared to reverse long years of hard, yet-to-be-won, struggles to control visual blight.

III.

THE FIRST AMENDMENT DOES NOT GUARANTEE A PARTICULAR MODE OF ADVERTISING

"There is no blanket requirement that the legislature must subordinate all other legitimate public interests to the protection of free speech." *Markham Advertising, supra,* at p. 263. Appellants are not advertisers and have no standing on this issue. They stand only to lose the right "to collect revenue from others for broadcasting their commercial message."[6] *Capital Broadcasting Company* v. *Mitchell* (D.C. 3 judge court 1971) 333 F.Supp. 582, 584, aff., 405 U.S. 1000. (Ban on cigarette advertising.) They seek to obtain that right by implying that without their present mode of operation certain advertising will cease. Even if that claim were colorable, it should

[5]It is hard to tell from those two opinions whether this is *dicta* or the holding. *Steamboat Springs* provides a good discussion and citations on significant prohibitions.

[6]See footnote 14 of the California Supreme Court's opinion in this case.

not prevail. "Freedom of speech or press does not mean that one can talk or distribute where, when and how one chooses. Rights other than those of the advocates are involved. By adjustment of rights, we can have both full liberty of expression and an orderly life." *Breard* v. *City of Alexander, La.* (1951) 341 U.S. 622, 642 (on soliciting) and *Garcia* v. *Gray* (10th Cir. 1974) 507 F.2d 539, 543, cert. den., 421 U.S. 971 (no picketing). Even in the pure speech area there is no right to broadcast by all possible means. *Red Lion Broadcasting Co.* v. *F.C.C.* (1968) 395 U.S. 367[1] (equal time), *Lehman* v. *City of Shaker Heights* (1974) 418 U.S. 300, (transit signs), *Hudgens* v. *N.L.R.B.* (1976) 424 U.S. 507 (shopping centers), *United States* v. *O'Brien* (1968) 391 U.S. 367 (burned draft card), *Kovacs* v. *Cooper* (1949) 336 U.S. 77 (sound trucks), *Packer Corporation* v. *State of Utah* (1931) 285 U.S. 105 (ban on tobacco ads), *Rowan* v. *United States Post Office* (1970) 397 U.S. 728 (adult mail), *Young* v. *American Mini Theaters* (1976) 427 U.S. 50 (adult materials) and *Lloyd Corporation* v. *Tanner* (1972) 407 U.S. 551 (shopping centers).

First Amendment "guarantees are subject to the police power" which may "insure" such things as "tranquility." *Garcia*, at p. 544. "The scope of the police power is to be measured by the legislative will of the people upon questions of public concern." *Gar-*

[1] "It is the right of the viewers and listeners, not the broadcasters, which is paramount," at p. 390. *Acc., F.C.C.* v. *National Citizens Com. for Broadcasting* (1978) 436 U.S. 775, 779.

cia, at p. 544. The "city council may speak for the citizens on matters subject to the police power" in the First Amendment area. *Breard*, at p. 644. The people of many cities, through their elected representatives, have decided that balancing issue against billboards.

IV.

THE SAN DIEGO ORDINANCE DOES NOT IMPROPERLY LIMIT THE DISSEMINATION OF ADVERTISING BY FIRST AMENDMENT STANDARDS

A. Introduction

The *ratio decidendi* of appellant's argument (thinly veiled) is that they provide a medium of communication which is indispensible to a significant number of advertisers. That is their hope, to assert standing on this issue. Nothing in the record supports that assertion of fact. Nothing in the law requires a city to provide a medium of 300-plus square-foot signs visible from the most frequently traveled areas of the city. We shall discuss the latter first.

B. The First Amendment Protects Advertising—Not Billboards

There is now a body of work on the right to advertise. *Virginia State Board of Pharmacy* v. *Virginia* (1976) 425 U.S. 748, *Linmark Associates, Inc.* v. *Township of Willingboro* (1977) 431 U.S. 85 (1977), *Carey* v. *Population Services Intern.* (1977) 431 U.S. 678, *Bates* v. *State Bar of Arizona* (1977)

433 U.S. 350, *In Re Primus* (1978) 436 U.S. 412,[8] *Ohralik* v. *Ohio State Bar Assn.* (1978) 436 U.S. 477, *Friedman* v. *Rogers* (1979) 440 U.S. 1 and *Central Hudson Gas* v. *Public Service Com'n of N.Y.* (1980) ....U.S....., 100 S.Ct. 2343. With one inapposite exception, none of these cases apply to "media" claims. All agree that the protection afforded advertising is very limited. The doctrine of overbreadth does not apply.[9] *Bates* and *Freidman*. All those cases (with the same exception) concern a prohibition against conveying a specific item of information to an interested public. The San Diego ordinance does not stop druggists from advertising their prices (*Virginia State Board*), conveying contraceptive information (*Carey*) or bar all promotional advertising (*Central Hudson Gas*). These cases are clearly inapposite. While *Linmark* considered a ban on "for sale" signs attached to residential properties, the unique relationship of those signs to the ability of home owners to sell their own houses gives that ban more than a secondary impact on the right to advertise. Moreover, the means of promoting the state interest were poorly, if not ineffectively, designed to serve the public interest asserted. That case is also inapposite here. *Friedman*, which held that use of a trade name is not protected, is closer in point. Billboards, by their nature, are used to promote product, candidate, slogan,

[8] *Primus* is not strictly a commercial speech case. More was involved than advertising. It is clearly distinguishable and will not be discussed further. (Letter from ACLU Lawyer to an interested person.)

[9] That alone should be dispositive of this case. It is only by an overbreath type of analysis that anyone can assert that a limitation on signs is a ban on advertising.

and idea (sometimes), *identification*. They are not used for discussion. Their normal use is analogous to the use of trademarks.

The tests applied by this Court in advertising cases are instructive here. This Court has, in virtually all of these cases, recognized the durable, hardy nature of advertising. Quite correctly, this Court perceives that advertisers are not meek, mild, timid or without considerable resources and imagination with which to sell their wares. Consequently, this Court has applied a test more like that applied to an exercise of the police power not impacting speech. That is in keeping with the symbolic speech cases. *See, O'Brien.* Although variously stated, it appears that legislation reasonably designed to advance a police power objective does not run afoul of the First Amendment if appropriate methods of conveying the information involved remain untouched. The presumptions applicable to and tailoring (overbreadth) requirements of pure speech cases do not apply. Some confusion on the overbreadth question may have been generated by the Court's plurality opinion last term. *Central Hudson Gas* does say that the crucial question is whether the regulation is no more extensive than necessary.[10] That is understandable under the facts of that case where *all* promotional advertising was banned. Under those circumstances, no alternative channels could be available. The stated purpose

[10] The opinion in chief of only three Justices.

of the ban was energy conservation. The crucial question was whether an advertising ban was appropriate for that purpose. The concurring opinions were most concerned that the impact of such a broad ban would regulate more than commercial speech. They were quick to point out, however, that "it is important that the commercial speech concept not be defined too broadly lest speech deserving of greater constitutional protection be inadvertently suppressed." At p. ...., (100 S.Ct. 2358).[11] We do not believe that *Central Hudson* has introduced overbreadth analysis into commercial cases. There the regulation even prevented advertising of energy-saving devices. It was actually counter-productive to its purpose.

Appellants' reliance on *Erznoznick* v. *City of Jacksonville* (1975) 422 U.S. 205 and other overbreadth cases is misplaced. That case holds that a city cannot "discriminate in the regulation of expression on the basis of the content of that expression" although the time, place and manner of distribution may be regulated even where it might result in a total ban on the use of facilities, *Hudgens*, at p. 520. *Jacksonville* simply sought to mask censorship rather than "aid individuals in insulating themselves from unwanted" publications. *United States* v. *Treatman* (C.D. Ca. 1976) 408 F.Supp. 944, 945 and 954 ft. nt. 5. (Use of mails re unwilling receivers.) *Rowan* permits the kind of "media ban" involved here. A specific type

[11] Citing *Ohralik* which noted that putting commercial speech on a parity with other speech would devitalize the First Amendment by a process of leveling, at p. 456.

of material (cryptic images suitable for billboards) cannot be conveyed by a specific device (large outdoor signs).

C. The San Diego Ordinance Qualifies Factually as a Time, Place and Manner Regulation

1. The Presumption of Validity and the Record

A presumption of validity favors legislation; debatable questions are resolved in favor of the legislation, and if any facts which reasonably could be assumed afford support for the legislation, it will be upheld. *Goldblatt* v. *Town of Hampstead, New York* (1962) 369 U.S. 590. Land use regulations have been given great latitude. *Euclid* v. *Ambler Co.* (1926) 272 U.S. 365, *Arlington Heights* v. *Metro Housing Dev.* (1977) 429 U.S. 252, *Village of Belle Terre* v. *Boras* (1974) 416 U.S. 1, Eastlake v. *Forest City Enterprises, Inc.* (1976) 426 U.S. 668, and *Penn Central Trans. Co.* v. *City of New York* (1978) 438 U.S. 104. Regulations of primarily economic impact are also given wide latitude. A "clear and convincing showing that there is no rational basis" for them is required to invalidate them. *Carolene Products Co.* v. *United States* (1944) 323 U.S. 18, 31 and See, *Nebbia* v. *New York* (1934) 291 U.S. 502, 525. The economics of the advertising industry may be altered somewhat (shifts to other areas or other forms), but no fundamental civil right is touched by this ordinance.

The presumption of validity-afforded ordinances reflects the experience of many decades of judicial efforts to insure that ordinances expressing the determinations of the people's representatives are not cast aside by the difficulties inherent in litigation. The ability of the advocate to make fiction more real than facts, gain advantages procedurally or simply overpower places legitimate ordinances in jeopardy. The presumption of validity prevents powerful interests from sweeping away legislative determinations by advocacy alone. It places a subtantial burden on the challenger. These principles apply equally to regulations impinging on the exercise of expression, which, although protected by the First Amendment, does not constitute speech historically identified with the maintenance of a free society. *See, Kelley* v. *Johnson* (1976) 425 U.S. 238. In that case the Circuit Court had applied the compelling state interest test to a police department hair length regulation. Undoubtedly, if the department had been required to shoulder the burden of going forward with proof that a connection between hair length and safety existed, it would have faced very difficult evidentiary problems.[12] This court relieved the department of such difficulties, in effect, accepting the opinion testimony of those supporting the rule, and held that the challenger had not demonstrated "that there is no rational connec-

[12] Nothing in the constitution prohibits a (legislative body) from reaching a particular conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data." *Paris Adult Theater I* v. *Slaton* (1973) 414 U.S. 48, 63. *See, Moore* v. *Ward* (Ct. App. Kty. 1964) 377 S.W.2d 881, *Newman Signs* and the California Supreme Court's opinion in this case, at p. 859.

tion between the regulation" and "the promotion of safety of persons and property." At p. 247. The record does not show that the ordinances are so "irrational" that they are an "arbitrary exercise of the police power." *Kelley*, at p. 248. "In short, the judiciary may not sit as a super legislature to judge the wisdom or desirability of legislative policy determinations" absent the involvement of fundamental rights. *New Orleans* v. *Dukes* (1976) 427 U.S. 297, 303. Similar statements were made by this Court in a First Amendment case with the additional comment that "the city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect." *Young, supra*, at p. 71.[13] In a previous term the Court made it quite clear that it would apply compelling interest tests sparingly. *City of Charlotte* v. *L. 660, Intra. Assn. of Firefighters* (1976) 426 U.S. 283, *Washington* v. *Davis* (1976) 426 U.S. 229, *Eastlake* v. *Forest City Enterprises, Inc.* (1976) 426 U.S. 668, *New Orleans, Young, Kelley and Massachusetts Bd. of Retirement* v. *Murgio* (1976) 427 U.S. 307. All of these cases deal with what once might have been thought fundamental rights.

One cannot imagine a better case for the application of these principles. The results of lopsided advocacy are evident in the stipulation of facts.[14] Some

[13] *State of Washington* found a compelling interest in billboard removal.

[14] At the time San Diego entered into the Stipulation it had no idea *Valentine* v. *Christensen* (1942) 316 U.S. 52 would be disapproved. It is understandable that a busy under-budgeted litigator would enter into such a stipulation to avoid a long trial under such circumstances.

of the matter stipulated simply indulges in hyperbole and characterizations which we believe would bring considerable opprobrium on this Court were is used as the basis of Constitutional fact finding here.[15] Courts which have decided these cases without such stipulations have found to the contrary. Only Stipulations 2 and 28 relate to the question of a total ban. Number 2 is clearly inconsistent with the ordinance itself. Transit vehicles and benches, as well as many other areas, are clearly exempted. Appendix G, pp. 111a and 112a of the Jurisdictional Statement. Moreover, the California Supreme Court limited its application to billboards *per se*,[16] which according to the Stipulation are signs 12 x 24 feet in size or larger. (Stipulation No. 25.) Stipulation No. 2 is grossly misleading. Appellants cannot carry on their large-sign business but all outdoor advertising is not banned. Stipulation No. 28 only implies a partial (at most) exclusion by assuming that some advertisers rely on appellants' signs exclusively. It is vague and a gross exaggeration. Other courts have found that there are adequate alternatives, which makes that stipulation of no probative value. *John Donnelly*, found the argu-

[15] In California stipulations between parties may not bind a court on questions of law or conclusions to be drawn therefrom. *See, Leonard* v. *City of Los Angeles* (1973) 31 C.A.2d 473, 476, hear. den., and cases cited therein. The stipulation is not sufficient in scope to require a judgment. *See, Harris* v. *Spinali Auto Sales, Inc.* (1962) 202 C.A.2d 215, hear. den., "A stipulation made for the purpose of expediting a proceeding (here a summary judgment motion) 'ought not be used as a pitfall'." *Orr* v. *Ford* (1929) 101 C.A. 694, 699. Facts insufficient to a determination of issues presented do not become sufficient because they are introduced by stipulation. *Rubattino* v. *Ind. Acc. Com.* (1944) 65 C.A.2d 288, hear. den. Reviewing courts may judicially notice facts not introduced in evidence below. *People* v. *Stralla* (1939) 14 C.2d 617.

[16] Footnote 2 of that opinion.

ment that billboards were a "unique and distinct medium of communication" inappropriate. *See*, pp. 1279-1280.

2. There Are Adequate Alternative Means of Advertising

Aside from the specific exemptions and limited application of the ordinance, a plethora of the same information found on these giant signs is thrust on the public from every conceivable direction. Everything from Volkswagens painted with cigarette ads, bumper stickers, tee shirts, balloons, buttons, skywriters, to prime time television, remains untouched by these ordinances. There are signs in stores, malls, subways, buses, taxis and so forth. All of those cases which have considered the matter have found adequate alternative channels open. *Stuckey's Stores*, *Newman Signs* and *See*, *Lubbock Poster*, *Suffolk Outdoor*, *Ackerley Communications*, *Veterans of Foreign Wars*, *John Donnelly* and *Art Neon*, (all found billboard exclusion, time, place and manner in scope). Appellants, however, assert that the ordinance as applied to them is, in effect, a total denial of speech because there are no effective alternative channels of communication. We disagree. "Political and cultural messages are not normally confined to a particular situs for their efficacy and may be communicated by less visually damaging channels than billboards adjacent to scenic highways." *State of Washington*, *supra*, at p. 815. *John Donnelly*, also found that many, "if not all," of those messages found on billboards can be

"conveyed" elsewhere on media competitive "in cost" with appellants' signs, at pp. 1279-1280. This Court should not reinvent the wheel, as it were, and ignore what other courts have found on adequate records.

3. The Ordinance Serves Substantial Public Interests

Nothing in the record rebuts the stated purposes of the ordinance. Appendix G, p. 106a of appellants' Jurisdictional Statement. A considerable body of judicial opinion now exists which has found that such ordinances serve the interests of traffic safety. *Markham Advertising; State of Washington; John Donnelly; Veterans of For. Wars; Philanz Oldsmobile, Inc.* v. *Keating* (1976) 51 A.D. 437, 381 N.Y.S. 2d 916; *In re Columbus Outdoor Advertising Co.* (1977) 51 A.D. Ohio 2d 187, 367 N.E. 2d 920 and those other cases cited earlier wherein review by this Court has been denied. The master appointed to do the fact finding in *General Outdoor Advertising* found billboard "restrictions tend to promote public safety." At p. 809. Safety is "unquestionably at the core" of the police power. *Kelley*, at p. 247. On this point appellants have taken the posture in the past that such interference with their business can only be justified upon proof beyond a reasonable doubt that accidents are caused by billboards. That is not the test. This Court, again, need not invent the wheel and ignore all previous hard work on this subject. Both Congress and the California Legislature have found that billboard exclusion will "promote" safety.

23 U.S.C. Sec. 131(a) and Bus. & Prof. Code Sec. 5226.

Those interests in visual integrity, proportion, and so forth, which may be subsumed as aesthetic have also been extensively recognized as served by this kind of ordinance. (The cases are cited in the previous paragraph.) It is now the majority view that aesthetic considerations alone may support an exercise of the police power.[17] 21 A.L.R. 3d 1222. This Court has long recognized that it is "within the power of the legislature to determine that the community should be beautiful" as well as safe and healthy. *Berman* v. *Parker* (1954) 348 U.S. 26, 33, *Acc., Village of Belle Terre* (City as a "sanctuary," at p. 9), *New Orleans* (preservation of the "appearance" of streets, at p. 304) and *Penn Central Transportation* ("quality of life" at p. 134). *Acc. Young*, at p. 71. These signs "often are egregious examples of ugliness, destruction and deterioration." *Suffolk Outdoor Advertising*, at 393 N.Y.S. 2d 416, 420 (N.Y.S. Cts. Opinion). This is a wheel which this Court helped to forge.

General Outdoor Advertising, and other courts, have recognized that off-site advertising intrudes on unwilling viewers.[18] The court in *Veterans of For. Wars* found *Kovacs* apposite. "To enforce freedoms

[17] Courts have recognized that those considerations termed "aesthetic" necessarily have an economic impact as well. *County of Fayettte* v. *Holman* (1973) 11 Pa. Comwlth. 357, 345 A.2d 235, *Veterans of For. Wars* and *John Donnelly*.

[18] It is "forcibly thrust" on persons who "strongly wish to avoid" it but "cannot enjoy their natural rights to proceed unmolested," at p. 809. It is a "foisting" upon "the mass of the public against their desire," at p. 814.

of speech in disregard of the rights of others would be harsh and arbitrary itself." (*Kovacs* at p. 88.) This Court was not "insensitive to claims by citizens to comfort and convenience." At p. 88. The interest of private shopping centers in maintaining a "controlled, carefree environment" outweighed time honored First Amendment activitiy. *Lloyd*, at p. 554. "We think those communities that have found these methods of sale obnoxious may control them by ordinance." *Breard*, at pp. 644-645. "The radio can be turned off, but not so the billboard or street car placard." *Lehman*, at p. 302 (quoting *Packer Corp.*) Freedom from unsolicited and unavoidable advertising is most unusual in the urban setting today.[19] Because the billboard has no functional relationship to its surroundings, it is also the inescapable reminder that the values of the market place may yet subordinate all other values.

4. The Ordinance, As Interpreted, Is Not Too Restrictive

From a theoretical point of view San Diego could have written a narrower ordinance.[20] However, as a practical matter, the ordinance only covers commercial billboards.[21] Most, if not all, other means of out-

[19] Except in those special places where judges and legislators reside. Those areas of inner cities long since abandoned by the affluent have become billboard alleys.

[20] Something which can be said of most legislation. Appellants' inability to show that alternative channels do not exist is, on the other hand, the fatal weakness in this case.

[21] The term "off-site advertising" is only a device for defining billboards. Bus posters, benches, etc. are exempted by the ordinance. The purpose of the ordinance is to remove these large structures, not advertising. *See, Veterans of For. Wars* and footnote 2 of the California Court's opinion. While the device may be somewhat imperfect, perfection is not the requirement. *See, Massachusetts Bd. Retirement*, at p. 314.

door advertising currently in use are exempted. Jurisdictional Statement, p. 111a. The California Court (without reference to the exemptions) so interpreted it. (Footnote 2) Were the ordinance more specific in the terms by which it accomplished its purpose of ridding San Diego of these huge signs, appellants' arguments would remain unchanged. Alameda has a different (and atypical) ordinance which limits *all* signs to fifty square feet, prohibits roof signs and requires that off-site signs be at least two hundred feet apart.[22] In view of the regulations already approved by this Court, there should be no question about the validity of those regulations. In the Alameda litigation appellants attack that ordinance on precisely the same basis as they attack this ordinance. The new theory they seek to mask in traditional arguments is that anything which does not permit (at least) 12 x 24 foot signs at well-traveled intersections destroys a "media of communication." They assimilate their present way of doing business to the "First Amendment" by way of the "media" ploy. They argued to the trial court in the Alameda case that Alameda's regulations were a "sham" because those regulations did not accommodate their present standard-sized copy and therefore were a "total ban." The real thrust of their effort has always been to create a vested

[22] Appellants claim this case does not concern such regulations. They are careful not to concede the validity of such regulations. Jurisdictional Statement, at pp. 13-14. If this case is reversed they will cite it as authority that those regulations are invalid, the theory being that any regulation which does not accommodate their standardization copy is a "total ban." They insist on assimilating "their business" to "outdoor advertising." The two are not the same thing.

right in the *status quo*. The California Supreme Court did not permit the imperfections of the ordinance (or advocacy) to be used in that fashion. Rather than give the sparse and questionable stipulations more import than they deserve (at a cost to all other cities) that Court narrowly construed the ordinance. To invalidate it, even with *dicta* supporting the considerably restrictive regulations already approved by this Court, would encourage appellants' theory that their (12 x 24 plus) structures are protected by the First Amendment simply because they have been permitted to do business that way in the past.

The proper frame of reference for this issue is not gained by focusing on existing signs, but rather by reference to cities with no billboards. The precise First Amendment question is: Does the First Amendment guarantee the use of large billboards located (necessarily) at heavily traveled points, in all (or most) cities? The validity of zoning is viewed from prospective application. If valid prospectively, amortization becomes the issue. Must a city without billboards permit them (particularly in the 12 x 24 plus variety)? That would be the impact of reversal in this case.[23] The record only establishes that appellants have used large signs in San Diego for a period of years. A reversal on this record would also make it difficult to enforce even ordinances (like Alameda's) which specifically limit only the size and concentration of billboards.

[23] Many newer communities in California have never permitted billboards. Reversal here would necessarily place those ordinances in jeopardy.

Even if this Court were to require every city to accommodate some form of billboard, certainly the huge variety in vogue now need not be protected to serve First Amendment ends. Neither San Diego, or any other city, should be required to start from scratch the effort to eliminate the very large signs now in use. This Court has traditionally ruled on the narrowest possible Constitutional issue to avoid unintended inferences and confusion. *See, Agins, infra,* the Court need hold here is that the First Amendment does not protect the type of sign described by Stipulation No. 25. If this Court is going to also take the position that some form of billboard (as distinguished from other forms of outdoor advertising permitted by the ordinance[24]) must be permitted, it is best to do that by limiting the application of the ordinance. Otherwise, the case may be misconstrued, to frustrate any changes in the *status quo,* in all kinds of contexts, for years. There are far too many more difficult problems ahead for legislators which can only be solved by disturbing the *status quo.*

THE DUE PROCESS ISSUE

V.

INTRODUCTION

Appellants' Jurisdictional Statement on due process only makes additional First Amendment argu-

[24] There are no total bans on outdoor advertising anywhere (unless the Court accepts appellants' unstated premise that their signs *are* outdoor advertising). Ordinances are either not city-wide, contain exemptions, or apply (as construed here) in a limited manner. Considering the plethora of advertising media in use, it is difficult to imagine why the Constitution should be offended even by a ban on billboards of any size.

ments in a Due Process guise. Knowing that courts have almost uniformly rejected vested rights arguments as a talisman against the exercise of the police power, they seek to mask the vested rights argument in a "hybrid" of the First and Fourteenth Amendments. The "property" appellants seeks to protect is the use of the public streets (the public's investment) to carry out their business. Their *actual* property consists of trucks, typewriters, signs, leases, and so forth. Only the leases will be lost or without salvage value. The Stipulation only indicates a "fair market value" of the signs on an unspecified date. Appendix 14, p. 123a of the Jurisdictional Statement. That figure is irrelevant to the exercise of the police power.

VI.

AN EXERCISE OF THE POLICE POWER IS NOT INVALID MERELY BECAUSE IT WOULD PREVENT THE OPERATION OF A PARTICULAR BUSINESS

Again, the place to start is with a city that has no billboards. Must that city permit the erection of billboards within its limits? The answer, at least since *Hadacheck* v. *Los Angeles* (1915) 239 U.S. 394, has been "no." A comprehensive review of the cases and theories of "taking" was recently published by this Court in *Penn Central.* We will not review all of the cases cited therein. This Court relied on that research in its most recent case. *Agins* v. *City of Tiburon* (1980) ....U.S....., 100 S.Ct. 2138. It is sufficient to say that the Constitution has never guar-

anteed that one may use his property (trucks, typewriters, etc.) to engage in a particular business. Apparently, appellants hope to use the First Amendment to bootstrap a Fifth Amendment argument that, for the benefit of their advertisers, they have the right to engage in a particular business. A "taking" in the due process sense is only shorthand (word of art) for "unreasonable, arbitrary or capricious." A "taking" and a valid exercise of the police power are mutually exclusive concepts absent some kind of physical invasion of the property, which justifies the finding of a "taking" in the eminent domain sense (a different word of art).[25] The real properties upon which the signs rest remain unfettered for other uses. *Modjeska Sign Studios* v. *Berle* (1977) 43 N.Y.2d 468, 402 N.Y.S.2d 359, *app. dism.*, 439 U.S. 809. "By merely entering into a lease specifically for the purpose of erecting a billboard, a lessee is not immunized from regulation of billboards under the police power." *Modjeska*, at p. 365.

VII.

AMORTIZATION OF NONCONFORMING USES IS NOT INCONSISTENT WITH DUE PROCESS

Appellants would like to continue to use the public investment in streets from that monopoly position

[25] We do not discuss here the issue of whether or not a provision which bars all reasonable use of property is a "taking" in the eminent domain sense. As a matter of policy we would hope that, absent a physical invasion, the remedy would remain invalidation of those ordinances and not inverse condemnation. Extremely difficult practical and theoretical problems would ensue from confounding further the two meanings of "taking" by assimilating one to the other.

which the very ordinance under attack gave them for so many years. The prospective application of the ordinance does not really concern them.[26] However, they must attack that to give the removal argument credence.

Noxious uses (*per se* nuisances) of property may be abated without compensation or delay. The public cannot use (or invade) property without paying for it. Amortization is the "middle ground between prospective and retroactively" applied zoning laws. *Modjeska*, at p. 366. Nonconforming uses are nuisances (by definition) under zoning law. Abating a nuisance (by definition) immediately and without compensation puts too great a burden of the police power on individuals. Requiring payment places a burden on the exercise of the police power. Amortization is the way of "ameliorating" those burdens. *Modjeska*, at p. 366. Amortization serves a useful purpose. A leading case "pointed out that early optimism about spontaneous withering away of nonconforming uses has proved erroneous, and that they often flourished because of their monopolistic positions." 22 ALR3d 1134, 1138, Annotation: "Nonconforming Uses Amortization." Inability to eliminate nonconforming use may completely stifle zoning objectives. Condemnation has no application to these provisions which are "generally upheld." *Art Neon*, at p. 123. The fairness

[26] When the San Diego ordinance was declared invalid below, new permits were issued for the first time in years. Appellants were not happy with that. Prospective application of the ordinance cuts their competition.

of amortization is clear in the context of billboard regulation. Their value was created by government through its investment in highways.

Recovery of investment sufficiently ameliorates the private loss. *Modjeska, Lubbock Poster Co.* and 22 ALR 3d 1134. Loss of the expectation of more is not compensable or reason to frustrate a zoning scheme. That is the price of living in an orderly society. To expect a return of the present market value, or even the market value at time of adoption of the ordinance, (by payment or amortization) frustrates changes and improvements (as if the emergence of a better zoning scheme proves that the government was once foolish and has to pay for that). The Constitution has never made the government the guarantor of profits or appreciated values, particularly when those values are originally created by government itself. *Agins*, (down-zoning). Appellants are permitted to both stay in business long enough to substantially recover what they put into the business while retaining the assets as well. There is no property right to continue a business inconsistent with public safety, health and welfare. No greater burden of proof of the efficacy of the regulation is required merely because amortization is involved. If the regulation is valid prospectively, the business can be reasonably amortized. The people do not have to prove, beyond a reasonable doubt, the efficacy of the regulation merely because it includes amortization. That is appellants' approach.

This issue is not ripe for review in any case. The California Court remanded to the trial court the issue of how much time was reasonable. Alameda recently completed a trial on that issue. After extensive discovery and testimony by CPAs for both sides the trial court found that in seven and one-half years the billboard defendants had recovered not only all of their historical costs for their signs, but all or most of the fair market value of the signs as of the date of the passage of the ordinance requiring removal. It hardly comports with the dignity which the Constitution invests in the police power to require compensation for the present market value as well.

VIII

THE BOTTOM LINE

Due to calendar problems we prepared this brief from the matters set forth in the Jurisdictional Statement.[27] Just before printing San Diego graciously forwarded copies of the appellant (and amici) briefs to us. No surprises were found therein. Arguments are even more heavily buttressed by concepts which would create a vested right to do business as usual than we anticipated.[28] The application of these arguments to cities which presently have no billboards (or any kind of off-site signs) is totally ignored, as if nothing mattered about this litigation except appel-

[27] Some *Amici* have not read it. Equal protection is not raised therein.

[28] The vacated opinion of the California Court of Appeals is a monument to those concepts. The opinion is contrary to all prior precedent.

lants' ability to do business as usual. Were the business being conducted of any other nature, none of those arguments could even be suggested. The import of the ordinance is exaggerated beyond recognition. Signs on or in stores, malls, taxis, buses, subways, lawns, etc. are still signs. Eliminating billboards is no more control over content than defining frequencies, band widths and power settings for radio. That is particularly true if the application of the ordinance were limited to the large signs defined by the Stipulation. As a practical matter it is most convenient to use a definition of off-site advertising to define the huge structures that are presently located precisely in those locations where they do the most damage in terms of the concerns addressed by the ordinance. That technique does not result in curtailment of advertising, except by semantic manipulation in arguments. The California Court cut through those semantics. If that technique is rejected on Constitutional grounds to require a more specific technique (e.g., size and location limits *per se*) the effort to bring some discipline to sign advertising should not be put back another twenty years by a decision which requires the whole effort to start from scratch.

If doing loop-the-loops in airplanes were dangerous, skywriters would not be constitutionally exempted from a law forbidding them on the representation that loop-the-loops are required to make the letter "O." A condemned building is not spared the

bulldozer because it has a sign painted on it. Ogden Nash's poem is charming because it demonstrates (as only the artist can) the pomposity of those structures.[29] Scholarly dissertations on the constitutionality of billboards would certainly delight Charles Dickens. After seven years of it this writer finds himself looking over his shoulders to see if the little boy is pointing his finger at us or if the bailiff has turned into the Queen of Hearts. What is at stake here is a very profitable way of operating one advertising business, made very profitable by the very regulations at issue and other laws banning cigarette and liquor ads on electronic media. No constitutional values are endangered, unless that document has become so devitalized by the values of the market place that it now protects the most profitable way of doing business. Air pollution regulations necessarily increase the cost of paper, still the prime medium of communication. No one would interject the Constitution into the context of protecting that environment. Other businesses suffer the costs of changing their technology. Advertising will survive without huge signs.

Ingenuous efforts to convince this Court that the ordinance is a total ban on outdoor advertising only beg the question by providing a mask for the value judgment which this Court must necessarily make.[30]

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[29] That is graphically demonstrated by the pictures appellants have so carefully manufactured for the benefit of this litigation. It matters not what the content of the ad is, the media is the message. Billboards' complete lack of proportion or relation to their surroundings convey a very clear message: Nothing is more important than the selling.

[30] The California Court declined the invitation to wear such a mask, hence the Ogden Nash piece. The dissenting opinion adopts the mask.

That stratagem is result-oriented, merely another way of stating the desired conclusion. The ordinance is a total ban only if this Court requires the rest of the world to interpret it that way. Facially it is not a *total* ban. The California Court limited its application further (commercial billboards). This Court could limit it further yet. If the ordinance, as interpreted, is not narrow enough then limiting its application to the 12 x 24 plus commercial billboard is certainly narrow enough. The issue here is not whether or not a total ban on outdoor advertising is constitutional or not. No such thing actually exists today. In the living, breathing world outside the warp of legal proceedings, the question is whether or not communities that have billboards can correct that error and whether cities that do not have them must embrace them. Is this Court going to both require all communities to embrace commercial billboards *and* forbid them from determining the size and location of those structures? That would be a remarkable break with precedent. There is a world of difference between a decision which holds the ordinance valid as applied to the large billboards in vogue (and in issue here) while stating that it cannot be applied to appreciably smaller signs because some form of billboard must be permitted (subject to time, place and manner regulations), and a decision which holds, or even implies, that the Constitution protects 12 x 24 plus signs simply because they exist (and therefore necessarily have been utilized). If all communities

must embrace commercial off-site signs, in addition to those exempted by this ordinance, then the cities of America deserve an assurance that they can control the size and location thereof to prevent the kind of sign chaos now existing in San Diego and other cities.[31]

Justice is not done by going back to square one on the huge signs. The device of using off-site advertising as a convenient definition for large commercial billboards was certainly valid under *Valentine* when those ordinances were passed.

Justice is not done by requiring cities that never permitted these signs to embrace them. If they had been the target of this lawsuit none of the arguments made here could have been made there.

Justice is not done by granting vested rights to those who just happen to be in the business of renting huge signs today.

Other businesses have endured dramatic changes in technology. If we must endure commercial billboards then let them be reasonable. Standard Oil, Shell, McDonalds, and other businesses which swore they would never come to town if they were not allowed their big signs, came to town with small signs in hand when the bluff failed. As the San Diego

[31] Alameda switched to size and location some years ago out of an abundance of caution. We still see nothing wrong, however, constitutionally with the San Diego ordinance. Undoubtedly, any meaningful size limit would not permit the present huge signs.

ordinance stands, it leaves plenty of room to advertise. If the Court thinks the ordinance too broad, the industry can certainly survive without the big signs. To use the Constitution as the champion of those structures does nothing for the dignity of that document.

CONCLUSION

The decision of the California Supreme Court should be sustained.

Dated: December 8, 1980.

Respectfully submitted,

CARTER J. STROUD
City Attorney
City of Alameda
Attorney for Amicus Curiae

JOHN SCANLON
City Attorney
City of Hayward

LEROY W. KNUTSON
City Attorney
City of La Mesa

FURMAN B. ROBERTS
City Attorney
City of Orange

DAVID E. SCHRICKER
City Attorney
City of Redwood City

DANIEL J. CURTIN, JR.
City Attorney
City of Walnut Creek

JOHN POWERS
City Attorney
City of Vallejo

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

METROMEDIA, INC.,

Appellant,

v.

CITY OF SAN DIEGO, a municipal corporation, and DOES I through XX, inclusive,

Appellees.

PACIFIC OUTDOOR ADVERTISING CO., INC.,

Appellant,

v.

THE CITY OF SAN DIEGO, a municipal corporation, THE CITY COUNCIL OF SAN DIEGO and DOES I through 10, inclusive,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION *AMICUS CURIAE*

BRUCE J. ENNIS, JR.
CHARLES S. SIMS
c/o American Civil Liberties Union
132 West 43rd Street
New York, New York 10036
(212) 944-9800

DEBORAH J. STAVILE
NADINE STROSSEN
(Counsel of Record for *amicus curiae*)
125 Broad Street
New York, New York 10004
(212) 558-4000

Attorneys for American Civil Liberties Union, amicus curiae

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INTEREST OF AMICUS*

The American Civil Liberties Union (hereafter referred to as the "ACLU") is a nationwide, non-partisan organization of over 200,000 members, dedicated to defending the fundamental liberties guaranteed in the Bill of Rights. Foremost among those liberties is freedom of speech.

Since it was founded more than sixty years ago, the ACLU has been involved directly or as amicus in most of the important free speech cases. This is another such case.

The San Diego ordinance at issue here sharply curtails the flow

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* All parties have consented to the filing of this amicus brief, and their letters of consent have been filed with the Clerk of this Court.

of political speech[1] by completely eliminating billboards, a unique and important mode of communication, from an entire region.

Although the principal purpose of this amicus brief is to discuss the impact of the San Diego ordinance on political speech, the ACLU does not wish to imply lack of concern for the ordinance's impact on commercial speech. For the reasons advanced by Appellants, the ACLU also maintains that this ordinance unconstitutionally abridges commercial speech, which is protected by the First Amendment.

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1. For purposes of this brief, the phrase "political speech" is used to describe all speech other than "commercial speech" -- i.e., all speech that does not simply "propose a commercial transaction." Ohralik v. Ohio State Bar Assn., 436 U.S. 447 (1978).

The ACLU does not contend that all billboards must be permitted in all places, at all times. Limited regulations -- for example, prohibiting billboards from certain uniquely historical or scenic areas -- may be constitutionally permissible. But a complete ban on all off-site billboards throughout San Diego, including commercial and industrial zones, eliminates a distinct and important medium of political speech and thus clearly contravenes the First Amendment.

STATEMENT OF THE CASE

1. Appellants Metromedia, Inc. and Pacific Outdoor Advertising, Inc. appeal from a judgment of the California Supreme Court which reversed a summary judgment in their favor. They challenge San Diego

Ordinance No. 10795 (the "ordinance") as an unreasonable restriction on speech in violation of the First and Fourteenth Amendments.

Appellants are owners of what the ordinance defines as "outdoor advertising display signs" (hereafter referred to as "outdoor signs" or "billboards") which were leased to various persons, usually on a monthly basis, for the purpose of communicating with the public. Although the ordinance refers to "advertising" signs, it orders the removal from city limits of all outdoor signs -- including those conveying political messages -- with only a few limited exceptions.[2]

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[2] Although the majority opinion of the California Supreme Court properly recognizes that the ordinance would be infirm without any limiting
(fn. cont. on next page)

On-site signs[3] which identify religious and historical entities or products and services available at the sign's location, and "temporary political campaign signs" with messages pertaining to an upcoming election are exempt from the ordi-

(fn. cont.)

construction [see Appendices to Jurisdictional Statement (hereafter cited as "A.") at 3a, 4a n.2], the limiting construction added by the court was wholly inadequate. That construction did exclude such small signs as "picket sign[s] announcing a labor dispute or . . . placed in one's front yard proclaiming a political or religious message." Id. However, it left within the ordinance's prohibition all structures carrying such political signs as those depicted in A. I.

3 A. 107a, Sec. 101.0700B.

nance's removal requirements.[4] All other outdoor signs conveying political or commercial messages (hereafter referred to as "off-site" outdoor signs or billboards) are deemed nonconforming signs, and must be dismantled and removed. Thus, the thrust of the ordinance is to eliminate outdoor signs conveying messages that are not specifically related to the premises. See Section 101.0700F of the General Sign Regulations.

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4 A. 112a, Sec. 101.0700F 12 exempts from removal "[t]emporary political campaign signs, including their supporting structures, which are erected or maintained for no longer than 90 days and which are removed within 10 days after the election to which they pertain."

As demonstrated infra, even this narrow exemption is illusory because, by reason of the ordinance, there will be no structures on which to post such signs. In light of the substantial expense involved, political candidates will not be able to erect such temporary structures each time they wish to speak.

San Diego asserts as its purposes in eliminating outdoor signs the promotion of traffic safety, the improvement of the city's appearance, and "ensuring that signing is used as identification and not as advertisement."[5]

2. In the summary judgment proceedings before the California Superior Court, the parties stipulated to the following facts: prior to this ordinance San Diego restricted the erection of billboards to an area comprising less than 3% of the City's total area, and billboards were permitted only in places zoned for commercial and industrial purposes;[6]

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5 A. 106a-107a, Sec. 101.0700A.

6 A. 121a, 123a, stipulated fact no. 9. Those restrictions are not challenged in this case.

many businesses, politicians, and others who wish to convey a message choose billboards as their medium of expression because other media are "prohibitally [sic] expensive, insufficient and inappropriate";[7] "valuable commercial, political and social information is communicated to the public through billboards; and the ordinance will eliminate the outdoor advertising business" in San Diego, thus eliminating the distinct communication medium of billboards.[8]

Reversing the lower court decision, the California Supreme Court upheld the total ban on outdoor signs.

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7 A. 126a-127a, stipulated fact no. 28.

8 A. 120a, 125a-126a, stipulated facts nos. 2 and 28.

In holding that the ordinance did not violate the First Amendment, that court relied on this Court's summary dismissal, for want of a substantial federal question, of an appeal raising somewhat similar issues, but in a significantly distinguishable factual context, in Suffolk Outdoor Advertising Co. v. Hulse, 439 U.S. 483 (1978).[9]

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9 The California Supreme Court's wholesale reliance on the summary disposition in Hulse was misplaced. In contrast with rulings based upon briefs and oral arguments, summary dismissals are of only limited precedential value. Furthermore, Hulse would not be dispositive of this case in any event because two critical facts present here -- namely, (1) the effective elimination of political billboards resulting from the elimination of the commercial billboard industry from an entire region, and (2) the absence of adequate alternative means to communicate messages carried on billboards -- were not present in Hulse.

SUMMARY OF ARGUMENT

San Diego's ordinance directly and substantially abridges constitutionally protected speech by prohibiting the use of a distinct and effective form of communication, the outdoor sign.

The ordinance discriminates on the basis of content or subject matter, directly excluding from off-site outdoor signs all commercial speech and all but one narrow category of political speech. Moreover, elimination of the sole ostensibly permitted category of political speech -- temporary political campaign messages -- is a foreseeable and inevitable consequence of the ordinance's total elimination of commercial speech from off-site outdoor signs. The use of outdoor signs by commercial

advertisers makes the erection and leasing of the supporting structures for such signs an economically profitable business; therefore, such outdoor sign structures are also available for use by political speakers who, because their use is more sporadic, could not alone support this distinct means of communication. (Point I).

The ordinance would be unconstitutional even if there were adequate alternative means of communication. However, as the parties have stipulated, there are not. (Point II).

San Diego may reasonably regulate the time, place and manner of the use of outdoor signs through a regulation which is necessary to promote compelling governmental interests and is narrowly tailored to encroach only

minimally on protected speech while substantially advancing such interests. However, San Diego's absolute ban on all off-site outdoor signs, at all times, and in all places, is neither a reasonable regulation of time, place or manner, nor is it narrowly tailored as required. Finally, San Diego has failed to meet its burden of proving that the complete ban is necessary to advance, or does advance, any legitimate government interest. (Point III).

ARGUMENT

I. THE ORDINANCE UNCONSTITUTIONALLY DISCRIMINATES ON THE BASIS OF CONTENT OR SUBJECT MATTER, DIRECTLY ELIMINATING FROM OUTDOOR SIGNS ALL POLITICAL SPEECH OTHER THAN ONE LIMITED CATEGORY. MOREOVER, THE ORDINANCE'S ELIMINATION OF COMMERCIAL SPEECH FROM SUCH SIGNS WILL INEVITABLY CAUSE THE COMPLETE ELIMINATION OF ALL POLITICAL SPEECH THEREFROM.

A. The Ordinance Directly Eliminates Most Political Speech, Solely On The Basis Of Its Content or Subject Matter.

The ordinance on its face discriminates against and directly eliminates most political speech. By expressly exempting "temporary political campaign signs" (A. 112a), the ordinance directly prohibits, on the basis of content or subject matter, all other political speech (such as opposition to the United Nations or to the nuclear arms race, or support for Croation independence or the tax-cutting programs advocated by Howard Jarvis -- A.I.).[10]

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10 The ordinance also discriminates against most commercial speech on the basis of content or subject matter. "Signing . . . used as identification" is permitted;

(fn. cont. on next page)

Discrimination against any type of speech -- and certainly against political speech -- on the basis of "either the content or subject matter" is per se unconstitutional. Consolidated Edison Co. of New York v. Public Service Commission of New York, 65 L. Ed. 2d 319, 327 (1980); Carey v. Brown, 65 L. Ed. 2d 262, 276 (1980), and cases cited therein.[11]

(fn. cont.)

signing used as "advertisement" is not. A. 106a. However, in light of the ordinance's explicit discrimination against all political speech other than temporary political campaign speech, it is not necessary to explore its subject matter discrimination against most commercial speech.

11 Assuming arguendo that the challenged ordinance were a reasonable time, place or manner regulation (which, as discussed infra, it is not), it would still be unconstitutional for the reason that an

(fn. cont. on next page)

Even if such subject matter discrimination were not per se unconstitutional, San Diego has advanced no interest -- whether denominated compelling, substantial or rational -- which would justify permitting one category of political speech but prohibiting all others. If, for example, Howard Jarvis ran for elective office,

(fn. cont.)

otherwise "constitutionally permissible time, place or manner restriction may not be based upon either the content or subject matter of speech." Consolidated Edison Co. of New York v. Public Serv. Comm. of New York, 65 L. Ed. 2d 319, at 327 (1980). And as shown more fully infra, even if there were adequate alternatives for the communication of political speech generally, or political campaign speech in particular, this Court has "consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression." Id. at 330 n.10.

a temporary billboard supporting his program would be permitted. If he were not a candidate, exactly the same temporary billboard, supporting the same program, would be prohibited. The effects, if any, on traffic safety and aesthetics would be identical. There is nothing in the record to justify that discrimination. This Court has never suggested that all other types of political speech are entitled to less First Amendment protection than is political campaign speech. Compare Carey v. Brown, 65 L.Ed.2d 262 (1980).

Thus, both per se and on the record in this case, the ordinance is unconstitutional on its face because it discriminates against most political speech solely on the basis of its content or subject matter.

B. An Inevitable Consequence of The Ordinance's Elimination Of Commercial Speech From Off-Site Outdoor Signs is that Political Campaign Speech Will Also be Eliminated from Such Signs.

Even if it were constitutionally permissible to eliminate from outdoor signs all political speech other than temporary political campaign speech, the ordinance's exemption for temporary political campaign speech is illusory; as a result of the ordinance, even that category of political speech will also be eliminated from outdoor signs.

The record in this case conclusively establishes that only a miniscule portion of the income of those (such as Appellants) who erect, maintain and lease billboard structures derives from temporary political campaign signs. It would thus be prohibitively

expensive to erect and maintain such structures only to be leased on infrequent occasions, and then only for temporary periods of time, for political campaign speech. The parties have stipulated that enforcement of the ordinance "will eliminate the outdoor advertising business in the City of San Diego." A. 129a. Elimination of that business would eliminate the billboard structures which it erects and maintains. There would thus be no structures on which to post the temporary political campaign signs which the ordinance ostensibly permits. Moreover, even if some structures were erected temporarily to display political campaign signs, the greater expense of such billboard

messages would directly and foreseeably cause a substantial reduction in the number of such messages.

In short, the ordinance's ban on commercial speech will at a minimum greatly diminish, and more likely completely eliminate, political campaign speech. See Young v. American Mini Theatres, Inc., 427 U.S. 50, 71 n.35 (1975) (upholding zoning ordinance only because it did not "suppress" or "greatly restrict" protected speech).[12]

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12 Indeed, Justice Powell's concurring opinion suggests that a zoning restriction which would suppress speech "to any significant degree," or which would have more than an "incidental and minimal" "impact" on speech, would be unconstitutional. 427 U.S. at 77-79.

The billboard business depends on revenues from commercial speech in much the same way the newspaper business depends on revenues from commercial speech, only much more so. An ordinance prohibiting commercial advertisements in newspapers (in order to conserve trees or reduce litter, for example) would have less impact on the political messages carried by newspapers than would the commercial billboard ban at issue here, since newspapers might still be sold (albeit at a sharply higher price). Nevertheless, a complete ban on commercial speech in newspapers would certainly be held unconstitutional. A fortiori, San Diego's complete ban on commercial speech on off-site billboards, with its significantly greater adverse impact on political speech in that

distinct and important medium of communication, is also clearly unconstitutional.

II. THE ORDINANCE WOULD BE UNCONSTITUTIONAL EVEN IF THERE WERE ADEQUATE ALTERNATIVE MEANS OF COMMUNICATION. IN ANY EVENT, THE PARTIES STIPULATED THAT THERE ARE NO SUCH ALTERNATIVE MEANS.

A. The First Amendment Protects A Speaker's Choice Of A Communication Medium.

Unless speech falls into one of the narrow categories outside First Amendment protection, such as fighting words or obscenity, it comes within "the usual rule that governmental bodies may not prescribe the form or content of individual expression." Cohen v. California, 403 U.S. 15, 24 (1970) (emphasis added).

Although this Court seemed to leave open the question "whether a ban on signs or a limitation on the number of signs could survive constitutional scrutiny if it were unrelated to the suppression of free expression,"[13] as the preceding section of this brief demonstrates, San Diego's ban on outdoor signs does suppress free expression, most notably because, discriminating solely on the basis of subject matter, it eliminates all political speech from outdoor signs.

Even if the ordinance were content-neutral, and banned all speech from outdcor signs regardless of its subject matter, it would still fall afoul of this Court's consistent

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13 Linmark Associates, Inc. v. Town of Willingboro, 431 U.S. 85, 95 n.7 (1976).

rulings that there is a protected First Amendment interest in choosing "the form" of one's expression as well as its content. E.g., Consolidated Edison Co. of New York v. Public Service Commission of New York, 65 L. Ed. 2d 319, 330 n.10 (1980) (adequate alternative means held irrelevant). Accord, Town of Southhampton v. Troyer, No. 80-333, 49 U.S.L.W. 3371 (November 18, 1980), in which this Court summarily affirmed a decision by Judge Weinstein that invalidated an ordinance banning door-to-door solicitation. As Judge Weinstein held, "the Constitution does not allow government to create [even] a rebuttable presumption that people do not wish to be exposed to a particular class of ideas, or mode of expression." Troyer v. Town of

Babylon, 435 F.2d 1135, 1138 (E.D.N.Y.) aff'd sub non. Town of Southampton v. Troyer, No. 80-333, 49 U.S.L.W. 3371 (November 18, 1980).

Billboards have developed in our mobile society as an important and distinct means for the communication of ideas. Highway and street billboards are protected by the American heritage that "wherever the title of streets or parks may rest, they have immemorably been held in trust for the use of the public and, time out of mind, have been used for purposes of . . . communicating thoughts between citizens and discussing public questions." Grayned v. City of Rockford, 408 U.S. 104, 115 (1971), quoting, Hague v. CIO, 307 U.S. 496, 515 (1939). Accord, Carey v. Brown, 65 L. Ed.2d 262, 269 (1980).

Although San Diego may prefer other means of communication, it cannot completely eliminate outdoor signs any more than it could completely eliminate street demonstrations, street leafletting, or street picketing. As this Court stated over fifty years ago in striking down ordinances which absolutely banned leafletting, "mere legislative preferences or beliefs of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions." Schneider v. State, 308 U.S. 147, 161 (1939). See also Talley v. California, 362 U.S. 60 (1960).

In Schneider, this Court recognized the importance of leafletting as

a distinct means of communication and invalidated four ordinances that absolutely prohibited the distribution of handbills on public streets. In the decades since Schneider, as motorists have replaced pedestrians, billboards have become the functional equivalent of leaflets.[14] The billboard reaches the same mobile street audience that, according to this Court, the Schneider leafletters had a constitutional right to address.

B. The Existence Of Alternative Communication Media Does Not Permit The Government To Foreclose A Speaker From His Chosen Medium.

The existence of adequate alternative means of communication would

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14 Today, the use of billboards is as "essential to the poorly financed causes of little people" as was the distribution of leaflets nearly forty years ago. Martin v. Struthers, 319 U.S. 141, 146 (1942).

not permit San Diego to restrict a speaker's choice of how best to express his message. "One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." Schneider, 308 U.S. 147, 163 (1939).

Where, as here, the prohibition of a means of expression is applied according to the subject matter of the speech, this Court's prior decisions establish beyond question that such prohibition violates the First Amendment and would not be saved from unconstitutionality by the existence of alternative means of expression. See n.11, supra. Moreover, the ACLU maintains that under the principles enunciated in this Court's prior decisions, the flat prohibition of an

entire, distinct communication medium would not be saved from unconstitutionality by the existence of alternative media, even if the prohibition did not discriminate according to subject matter.

These principles were recently affirmed when this Court invalidated a regulation which had forbidden Consolidated Edison from expressing its views on controversial issues through the medium of inserts mailed to consumers in billing envelopes. Despite the availability of adequate alternative means for communicating with the public, suppression of this speaker's chosen means was held to infringe its First Amendment rights. Consolidated Edison Co. of New York v. Public Service Commission of New York,

65 L. Ed.2d 319, 330 n.10 (1980). Moreover, unless there is a First Amendment right to choose the means of conveying one's message regardless of whether alternative means exist, the alternatives of brokers' listings and newspaper classified advertisements would have saved an ordinance prohibiting the use of front lawn signs for selling real estate. However, this Court invalidated such an ordinance in Linmark Associates v. Town of Willingboro, 431 U.S. 85 (1976).

C. On The Record In This Case, There Are No Adequate Alternatives To Billboards.

The parties stipulated that the billboard is a unique medium of expression, describing other media, in contrast, as "insufficient, inappropriate and prohibitally [sic] expensive." A. 126a. Nevertheless, the California

Supreme Court ignored the parties' stipulation and concluded to the contrary, finding as a "fact", without any evidentiary support whatsoever in the record, that adequate alternative means of communication existed. A. 22a. The obvious impropriety of this "finding" requires no protracted comment. With no supporting evidence, the court found: "Advertisers . . . can communicate through newspapers, magazines, radio and television . . . [N]on-commercial advertisers . . . also possess a great variety of alternative means of communication, including some methods, such as leafletting, which are not more expensive than billboards."

A. 23a. That finding is not binding here.[15]

In sum, the finding that there are adequate alternatives to outdoor signs is irrelevant and, in any event, cannot be upheld on this record.

III. THE COMPLETE BAN ON OUTDOOR SIGNS CANNOT BE UPHELD BECAUSE SAN DIEGO HAS FAILED TO DEMONSTRATE THAT THE ORDINANCE IS NECESSARY TO ADVANCE ANY COMPELLING GOVERNMENT INTEREST.

The prohibition of an entire and

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This Court has repeatedly ruled that in free speech cases appellate courts have a "duty" and an "obligation" to conduct an "independent" or "de novo" examination of the factual record. E.g., Ohralik v. State Bar Association, 436 U.S. 447 (1978); Letter Carriers v. Austin, 418 U.S. 264, 282 (1974); Rosenbloom v. Metromedia, 403 U.S. 29, 53-54 (1971); Cox v. Louisiana, 379 U.S. 536 (1965); St. Amant v. Thompson, 390 U.S. 727 (1968); Time, Inc. v. Pape, 401 U.S. 279, 284 (1971).

unique medium of expression "strikes at the heart of the freedom to speak." Consolidated Edison of New York v. Public Service Commission of New York, 65 L. Ed.2d 319, 326 (1980). To justify even an incidental limitation on speech the regulation must further a compelling governmental interest and be "no greater than is essential to the furtherance of that interest." United States v. O'Brien, 391 U.S. 367, 377 (1967).

This Court has consistently imposed on government the burden of justifying restrictions on speech. E.g., Consolidated Edison Co. of New York v. Public Service Commission of New York, 65 L. Ed.2d at 319, 326 (1980) ("We must consider whether the state can demonstrate that its regulation is constitutionally per-

missible"). The government bears that burden in both political and commercial speech cases. Central Hudson Gas & Electric v. Public Service Commission, 65 L. Ed.2d 341, 354 (1980) ("The Commission . . . has not demonstrated that its interest in conservation cannot be protected adequately by more limited regulation of appellant's commercial expression"); Linmark Associates v. Town of Willingboro, 431 U.S. 85, 95 (1980); Virginia Board of Pharmacy v. Virginia Consumer Council, 425 U.S. 748, 770 (1975).

Here, the California Supreme Court erroneously required Appellants to show that the ordinance is unnecessary or fails reasonably to relate to San Diego's proffered objectives. A. 7a. That error alone requires reversal.

San Diego's ordinance recites three purposes for eliminating billboards: 1) to promote traffic safety, 2) to improve the city's appearance, and 3) to ensure that signs are used for identification and not advertising purposes. The California Supreme Court made no factual determination that the ordinance is necessary to advance, and does in fact advance, any of those interests. Nor is there any evidence in the record from which the court could have made such a determination. Accord, Linmark Associates v. Town of Willingboro, 431 U.S. 86, 95 (1976).

For example, San Diego has not shown that the ordinance even relates to, let alone substantially advances, the concededly important goal of traffic safety. The California Supreme Court's conclusion "as

a matter of law that an ordinance which eliminates billboards designed to be viewed from the streets and highways reasonably relates to traffic safety", A. 7a (emphasis added), is not a finding that the ordinance is "necessary," and in any event does not constitute the required factual justification for the ordinance's abridgement of speech. There was no evidence in the record to support the court's conclusion. The court could as easily have concluded, "as a matter of law," that by providing stimuli to break the tedium of driving, billboards keep drivers alert and thereby prevent accidents. The court's contrary speculation provides inadequate justification for an ordinance that effectively eliminates most political speech from

a unique medium of communication.[16]

The improvement of San Diego's appearance was also found by the California Supreme Court to be sufficient justification for the elimination of outdoor signs. However, this Court previously held precisely the same asserted governmental interest to be insufficient, as a matter of law, to justify an ordinance totally banning another distinct medium of communication -- the leaflet. Schneider v. State, 308 U.S. 147, 162 (1939). In addition, the Court has plainly indicated that governmental interests

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16 The record in this case demonstrates that prior to enactment of the challenged ordinance, billboards had already been zoned out of 97% of the city's area. Accordingly, it should have been easy for San Diego to demonstrate a connection between billboards and accidents, if one existed. No such demonstration was attempted.

of an aesthetic nature cannot justify a complete ban on adult entertainment. Young v. American Mini Theatres, supra, 427 U.S. 50 (1975). "[F]reedom of speech cannot be made subservient to any definition of beauty or aesthetics." State ex rel Dept. of Transportation, 603 P.2d 337, 342 (Okla. 1979). See also Erznozik v. City of Jacksonville, 422 U.S. 205, 212 (1974) (members of the public offended by nudity on drive-in movie screens may avert their eyes); Cohen v. California, 403 U.S. 15, 21 (1970) (members of the public offended by explicit language or symbols condemning the draft may avert their eyes).[17]

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17 Additionally, as other courts have noted, there is some tension

(Footnote continued on next page)

The final purpose of the ordinance asserted by San Diego is to ensure that signs are used for "identification", not "advertising". But this circular justification hardly constitutes a legitimate government interest which might permit a restriction on the use of outdoor signs. To

(Footnote cont'd)

between the two proffered objectives of improving the city's appearance and promoting traffic safety. See, e.g., State ex rel Dept. of Transportation, 603 P.2d 337, 342 (Okla. 1979):

> "The argument is made that our residents are entitled to look at the beauty of the countryside, untrammeled by the blight of billboards, in the face of statements that billboards can be banned because they constitute a distraction to drivers of automobiles. Using this reasoning, one could argue the countryside should be covered with billboards to reduce the temptation to avert one's eyes from the road."

the contrary, it embodies a flagrant censorship on the basis of subject matter which clearly violates the First Amendment. E.g., Consolidated Edison of New York v. Public Service Commission of New York, 65 L.Ed.2d 319 (1980); Virginia Board of Pharmacy v. Virginia Consumer Council, 425 U.S. 748 (1975).

In short, on the record in this case, San Diego has not met its burden of proving that the wholesale ban on outdoor signs is necessary and narrowly tailored to advance compelling government interests while encroaching only minimally on First Amendment rights. Consequently, the ordinance violates the First Amendment.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

DEBORAH J. STAVILE
NADINE STROSSEN
(Counsel of Record for *amicus curiae*)
125 Broad Street
New York, New York 10004
(212) 558-4000

BRUCE J. ENNIS, JR.
CHARLES S. SIMS
c/o American Civil Liberties Union
132 West 43rd Street
New York, New York 10036.
(212) 944-9800

Attorneys for American Civil Liberties Union *Amicus Curiae*

Dated: New York, New York
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No. 80-195

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

METROMEDIA, INC.,

Appellant,

v.

CITY OF SAN DIEGO, a municipal corporation, AND DOES I THROUGH XX, INCLUSIVE,

Appellees.

PACIFIC OUTDOOR ADVERTISING CO., INC.

Appellant,

v.

THE CITY OF SAN DIEGO, A MUNICIPAL CORPORATION, THE CITY COUNCIL OF SAN DIEGO, VOYD BEIGHTS, ZONING ADMINISTRATOR OF THE CITY OF SAN DIEGO AND DOES 1 THROUGH 10, INCLUSIVE,

Appellees,

On Appeal From The Supreme Court of California

BRIEF AMICUS CURIAE OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION IN SUPPORT OF APPELLANTS

ARTHUR B. HANSON
FRANK M. NORTHAM
MITCHELL W. DALE
ARTHUR D. MCKEY
HANSON, O'BRIEN,
BIRNEY & BUTLER
888 Seventeenth Street, N.W.
Suite 1000
Washington, D.C. 20006
Attorneys for Amicus Curiae
American Newspaper Publishers
Association

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On Appeal From The Supreme Court of California

BRIEF AMICUS CURIAE OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION IN SUPPORT OF APPELLANTS

PRELIMINARY STATEMENT

The American Newspaper Publishers Association (hereinafter "ANPA") submits this brief amicus curiae in support of Appellants Metromedia, Inc. and Pacific Outdoor Advertising Co., Inc. All parties to this suit have given ANPA written consent to the filing of this brief. Copies of such consents have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS

ANPA is a non-profit membership corporation organized under the laws of the Commonwealth of Virginia. Its membership consists of more than 1,410 newspapers constituting over 90 percent of the total daily and Sunday newspaper circulation, and a substantial portion of the weekly newspaper circulation, in the United States.

While ANPA is principally concerned with issues of general significance to the profession of journalism and the newspaper publishing business, and has frequently presented its views to this Court as an *amicus curiae* in cases touching on those concerns, ANPA and its members are ever vigilant to ensure that the free speech and free press guarantees of the First Amendment are not abridged.

The First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . ," *Associated Press* v. *United States,* 326 U.S. 1, 20 (1945), and "the best means to that end is to open the channels of communication, rather than to close them . . ." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 770 (1976).

It should be noted that there is no allegation in this case that the commercial speech sought to be eliminated is misleading, false, related to unlawful activity, or otherwise subject to regulation as delineated in *Central Hudson Gas & Electric Co.* v. *Public Service Comm'n.,* —U.S.—, 65 L.Ed 2d 341 (1980). Contrawise, this is the very type of commercial speech which the court has recognized as subject to First Amendment protection in *Virginia State Board of Pharmacy, supra, First National Bank of Boston* v. *Bellotti,* 435 U.S. 765 (1978) and *Bigelow* v. *Virginia,* 421 U.S. 809 (1975). ANPA is firmly committed to the proposition that the First Amendment not only affirmatively requires protection for a "multitude of voices" but also prohibits the government from completely suppressing any particular medium through which information and ideas may be communicated.

The city ordinance in the instant case absolutely bans all off-site outdoor advertising and, if permitted to stand, will result in the complete elimination of a means of communication and media for the expression of ideas. Because your *amicus* believes that the First Amendment prohibits the elimination of any particular medium of expression, ANPA desires to briefly present to the Court, for its assistance, its views on the significant issues raised by appellants herein.

QUESTIONS PRESENTED, CONSTITUTIONAL PROVISIONS INVOLVED AND STATEMENT OF THE CASE

ANPA adopts the questions presented, constitutional provisions involved and statement of the case, all as set forth in the appellants' brief.

ARGUMENT

THE FIRST AMENDMENT GUARANTEES TO THE PUBLIC THE RIGHT TO RECEIVE INFORMATION AND, CONCOMITANTLY, PROHIBITS THE GOVERNMENT FROM BANNING A MEDIUM OF COMMUNICATION.

This Court frequently has held that the First Amendment not only guarantees the freedom to speak and to publish but also the freedom of the public to receive informational ideas. See *Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U.S. 748 (1976); *Stanley* v. *Georgia,* 394 U.S. 557 (1969); *Griswold* v. *Connecticut,* 381 U.S. 479 (1965); *New York Times* v. *Sullivan,* 376 U.S. 254 (1964). The First Amendment freedoms of speech and press act as an essential protection against arbitrary and oppressive exercise of the powers delegated to our federal and state governments, but the right of the public to speak and the press to publish is unfulfilled without a correlative public right to receive information. See, Emerson, *Legal Foundations of the Right to Know,* 1976 WASH. U.L.Q., 6-7 (1976); Note, *The Constitutional Right to Know,* 4 HASTING CONST. L.Q. 109 (1977). This Court has recognized this

right on several occasions. In *Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U.S. 85 (1977), this Court struck down a city ordinance prohibiting the posting of real estate "For Sale" or "Sold" signs, based on both the speaker's right to communicate and the listener's "First Amendment interest in the subject matter of the speech." *Id.* at 92. *See also Virginia Pharmacy Bd.* v. *Virginia Consumer Council,* 425 U.S. 748 (1976). The case of *Procunier* v. *Martinez,* 416 U.S. 396 (1974) recognized a right to receive personal correspondence. This Court further has held that both "a labor organizer's right to speak and the right of workers 'to hear what he had to say,' . . . were abridged by a state law requiring organizers to register before soliciting union membership." *Kleindienst* v. *Mandel,* 408 U.S. 753 at 763 (1972), citing *Thomas* v. *Collins,* 323 U.S. 516 (1945).

In *Stanley* v. *Georgia,* 394 U.S. 557 (1969), this Court noted that "[It] is now well established that the Constitution protects the right to receive informational ideas . . . This right to receive informational ideas . . . is fundamental to our free society." *Id.* at 564. And in *Griswold* v. *Connecticut,* 381 U.S. 479, 482 (1965), the Court referred to a right to receive information as falling within the penumbra of the First Amendment freedoms of speech and press.

The acknowledged right to receive information is of no value if the government has the power to eliminate the means of conveying such information. Whether the San Diego ordinance, at issue herein, is viewed as an abridgement of freedom of the press ("The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell* v. *Griffin,* 202 U.S. 444, 452 (1938)), or as an abridgement of freedom of speech ("The primary concern of the free speech guarantee is that there be full opportunity for expression in all of its varied forms to convey a desired message." *Young* v. *American Mini Theatres,* 427 U.S. 50, 76 (1976) (Powell, J. concurring)), it is clear that, by attempting to eliminate all off-site outdoor advertising, the

ordinance violates the First Amendment. The parties have stipulated that there are no adequate alternative means of serving the "many businesses and politicians and other persons" whose needs are served only by outdoor advertising, yet this Court has expressed grave concern as to the constitutionality of less restrictive ordinances which failed to "leave open ample alternative channels for communication." *Virginia Pharmacy Board, supra* at 771.

> Although in theory sellers remain free to employ a number of different alternatives, in practice realty is not marketed through leaflets, sound trucks, demonstrations, or the like. The options to which sellers realistically are relegated—primarily newspaper advertising and listing with real estate agents—involve more cost and less autonomy than "For Sale" signs; cf. *Martin* v. *City of Struthers,* 319 U.S. 141, 146, 87 L.Ed. 1313, 63 S.Ct. 862 (1943); *Kovacs* v. *Cooper, supra,* at 102-103, 93 L.Ed. 513, 69 S. Ct. 448, 10 ALR2d 608 (Black, J., dissenting); are less likely to reach persons not deliberately seeking sales information, cf. *United States* v. *O'Brien,* 391 U.S. 367, 388-389, 20 L.Ed. 2d 672, 88 S.Ct. 1673 (1968) (Harlan, J., concurring); and may be less effective media for communicating the message that is conveyed by a "For Sale" sign in front of the house to be sold, cf. *Cohen* v. *California,* 403 U.S. 15, 25-26, 29 L.Ed 2d 284, 91 S.Ct 1780 (1971).

Linmark Associates, Inc. v. *Township of Willingboro,* 431 U.S. 85, 93 (1977).

No less than the "For Sale" signs in *Linmark Associates, supra,* the handbills in *Jamison* v. *Texas,* 318 U.S. 413 (1943), door-to-door solicitation as in *Martin* v. *City of Struthers,* 319 U.S. 141 (1943) or leaflets as in *Lovell* v. *City of Griffin,* 303 U.S. 444 (1938), the off-site outdoor advertising at issue in the instant case is entitled to First Amendment protection. This is especially so since, as stipulated, outdoor advertising in San

Diego contains "valuable commercial, political and social information." In recent years, this Court has recognized that commercial speech is protected by the First Amendment for "[c]ommercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information." *Central Hudson Gas & Electric Co.* v. *Public Service Comm'n.*, — U.S. —, 65 L.Ed 2d 431, 348 (1980); see also *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bigelow* v. *Virginia*, 421 U.S. 809 (1975).

While, in varying contexts, this Court has established criteria whereby protected expression could be limited, see *e.g.*, *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (zoning restrictions on locations of adult movie theatres); *Grayned* v. *Rockford*, 408 U.S. 104 (1972) (antinoise regulation prohibiting demonstrations that would disturb the good order of an educational facility), the Court has never upheld a law which absolutely prohibited the usage of a particular medium of communication. In *Jamison* v. *Texas*, 318 U.S. 413 (1943), the Court invalidated an ordinance which prohibited the distribution of handbills at all places, at all times, and under all circumstances. And in *Schneider* v. *State*, 208 U.S. 147 (1939) the Court refused to uphold a similar ordinance despite the State's argument that the restriction only applied to public streets and sidewalks.

A review of this Court's decisions in the First Amendment area demonstrates that, on numerous occasions, regulations which are based on the content of speech have been invalidated. *Consolidated Edison Co.* v. *Public Service Comm'n.*, — U.S. — 65, L.Ed 2d 319 (1980) (order barring utilities from including inserts discussing controversial public policy issues in billing envelopes); *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975) (prohibition of the exhibition of films containing nudity at drive-in theaters having screens visible from a public place); *Police Department* v. *Mosley*, 408 U.S. 92 (1972) (ordinance prohibiting picketing near schools except peaceful

picketing of any school involved in labor dispute). Similarly, the Court has not hesitated to hold unconstitutional regulations whereby protected expression may be exercised only if a permit or license is obtained. *Hynes* v. *Mayor of Oradell,* 425 U.S. 610 (1976) (ordinance requiring an identification permit for canvassing or soliciting for charitable or political purposes); *Saia* v. *New York,* 334 U.S. 558 (1948) (permit required for operation of a sound truck); *Hague* v. *Committee for Industrial Organization,* 307 U.S. 496 (1939) (permit required for holding designated public meetings).

Although regulations which restrict the exercise of protected expression may be upheld where they are precisely tailored to satisfy a significant state interest, the least restrictive means of regulation are utilized, and there are ample alternative means available for expression of the regulated communication, see *Central Hudson Gas, supra* at 349-350; *Consolidated Edison, supra* at 332 n.2 (Stevens, J. concurring), in none of those cases was a complete ban on a given medium of communication upheld.

The argument that the San Diego ordinance is merely a time, place and manner restriction cannot be sustained where the restriction is so broad that it eliminates an entire form of expression and, thereby, denies to certain speakers the opportunity to communicate their message. *Murdock* v. *Pennsylvania,* 319 U.S. 105, 112 (1943) ("Those who can deprive religious groups of their colporteurs can take from them a part of the vital power of the press which has survived from the Reformation."). No better statement of the reasons for invalidating the San Diego ordinance can be made than the words of Justice Black, dissenting in *Kovacs* v. *Cooper,* 336 U.S. 77 (1949). Although the plurality in that case upheld the appellant's conviction, it did so on the basis that he was convicted of operating a sound truck that emitted "loud and raucous noises." Justice Black believed that, under the facts of the case, the appellant was convicted merely for the act of operating a

sound truck and eloquently explained the invalidity of any regulation which banned the use of a form of communication:

> The New Jersey ordinance is on its face, and as construed and applied in this case by that state's courts, an absolute and unqualified prohibition of amplifying devices on any of Trenton's streets at any time, at any place, for any purpose, and without regard to how noisy they may be.
>
> * * * *
>
> In this case the Court denies speech amplifiers the constitutional shelter recognized by our decisions and holding in the Saia Case. This is true because the Trenton, New Jersey, ordinance here sustained goes beyond a mere prior censorship of all loud speakers with authority in the censor to prohibit some of them. This Trenton ordinance wholly bars the use of all loud speakers mounted upon any vehicle in any of the city's public streets.
>
> In my view this repudiation of the prior Saia opinion makes a dangerous and unjustifiable breach in the constitutional barriers designed to insure freedom of expression. Ideas and beliefs are today chiefly disseminated to the masses of people through the press, radio, moving pictures, and public address systems. To some extent at least there is competition of ideas between and within these groups. The basic premise of the First Amendment is that all present instruments of communication, as well as others that inventive genius may bring into being, shall be free from governmental censorship or prohibition. Laws which hamper the free use of some instruments of communication thereby favor competing channels. Thus, unless constitutionally prohibited, laws like this Trenton ordinance can give an overpowering influence to views of owners of legally favored instruments of communication. This favoritism, it

seems to me, is the inevitable result of today's decision. For the result of today's opinion in upholding this statutory prohibition of amplifiers would surely not be reached by this Court if such channels of communication as the press, radio, or moving pictures were similarly attacked.

There are many people who have ideas that they wish to disseminate but who do not have enough money to own or control publishing plants, newspapers, radios, moving picture studios, or chains of show places. Yet everybody knows the vast reaches of these powerful channels of communication which from the very nature of our economic system must be under the control and guidance of comparatively few people. On the other hand, public speaking is done by many men of divergent minds with no centralized control over the ideas they entertain so as to limit the causes they espouse. It is no reflection on the value of preserving freedom for dissemination of the ideas of publishers of newspapers, magazines, and other literature, to believe that transmission of ideas through public speaking is also essential to the sound thinking of a fully informed citizenry.

* * * *

There is no more reason that I can see for wholly prohibiting one useful instrument of communication than another. If Trenton can completely bar the streets to the advantageous use of loud speakers, all cities can do the same. In that event preference in the dissemination of ideas is given those who can obtain the support of newspapers, etc., or those who have money enough to buy advertising from newspapers, radios, or moving pictures. This Court should no more permit this invidious prohibition against the dissemination of ideas by speaking than it would permit a complete blackout of the press, the radio, or

> moving pictures. It is wise for all who cherish freedom of expression to reflect upon the plain fact that a holding that the audiences of public speakers can be constitutionally prohibited is not unrelated to a like prohibition in other fields. And the right to freedom of expression should be protected from absolute censorship for persons without, as for persons with, wealth and power. At least, such is the theory of our society.

Kovacs v. *Cooper, supra* at 101-04 (Black, J. dissenting).

CONCLUSION

ANPA believes that Justice Black's reasoning and explanation of the First Amendment's guarantees are fully applicable to the case at bar. The First Amendment does not permit the government to pick and choose among forms of expression. If it did, then one of the primary purposes of that Amendment—to prevent the government from controlling that information which is available to the citizenry—would be eviscerated. For that reason the San Diego ordinance must be invalidated and the decision of the Supreme Court of California must be reversed.

Respectfully submitted,

ARTHUR B. HANSON
FRANK M. NORTHAM
MITCHELL W. DALE
ARTHUR D. MCKEY
HANSON, O'BRIEN,
BIRNEY & BUTLER
888 Seventeenth Street, N.W.
Suite 1000
Washington, D.C. 20010

Attorneys for Amicus Curiae
American Newspaper Publishers
Association

NOV 26 1
MICHAEL RODAK, JR.

No. 80-195

In The

Supreme Court of the United States

October Term, 1980

METROMEDIA, INC.,

Appellant,

vs.

CITY OF SAN DIEGO, a municipal corporation, and DOES I through XX, inclusive,

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PACIFIC OUTDOOR ADVERTISING CO. INC.,

Appellant,

vs.

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Appellees.

On Appeal From the Supreme Court of California

BRIEF AMICI CURIAE ON BEHALF OF APPELLANTS METROMEDIA, INC., and PACIFIC OUTDOOR ADVERTISING CO., INC., URGING REVERSAL

Amici

ROBERT P. POPE
BARBARA G. POPE
C & U Poster Advertising Co.

BY: KIP POPE of
BUSCH, HARRINGTON & PORTER
LAW OFFICES
201 W. University Avenue,
Suite 205
Champaign, Illinois 61820
(217) 352-4167

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

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*Amici Curiae adopt appellants' Questions Presented for Review, table of authorities, citations to the opinions and the judgments delivered in the Courts below, statement of the grounds on which jurisdiction is invoked, Constitutional provisions, statutes, ordinances, etc., which their case involves, summary of argument and argument.

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INTERESTS OF AMICI CURIAE

Mr. and Mrs. Robert P. Pope have been the sole owners of C & U Poster Advertising Co. (hereinafter C & U Poster) since 1970, having had a partial ownership interest since 1948. Mrs. Pope's father, F. H. Gillingham, bought the business in the early 1920's, the company having been incorporated in 1912 under a different name. The undersigned is the son of Mr. and Mrs. Pope; the grandson of F. H. Gillingham, the vice-president of C & U Poster,

and as a partner in the law offices of Busch, Harrington & Porter, is the attorney for the Popes and C & U Poster in litigation challenging the validity of sign ordinances of the cities of Champaign and Urbana, Illinois. Those ordinances would, if valid, obliterate the outdoor advertising industry in those cities in much the same manner as the San Diego Ordinance would do so in San Diego, California.

This brief is filed to acquaint this Honorable Court with the catastrophic effects that a San Diego-type sign ordinance would have on outdoor advertising from the perspective of a small, second generation family-owned outdoor advertising business and its advertisers.

Letters of consent to the filing of this brief have been obtained from the parties and filed with the Clerk of this Court.

STATEMENT OF THE CASE

1. Amici's Business and History:

C & U Poster is and long has been engaged in the outdoor advertising business in and about Champaign and Urbana, Illinois, in the same manner as Appellants Metromedia, Inc. and Pacific Outdoor Advertising Co., Inc. have been so engaged in San Diego. Accordingly, C & U Poster owns, leases or licenses real estate locations upon which it has erected its outdoor advertising structures (billboards and painted bulletins), the faces of which are rented, sold or donated to users for the purpose of communicating their message(s) to the driving, riding and walking public.

C & U Poster's structures have been customary uses in Champaign-Urbana for more than sixty (60) years, and the Popes believe them to be compatible with other commercial uses. C & U Poster's structures are located in the business and industrial zones of Champaign and Urbana, and were legally erected, either having been built under permit (under former sign ordinances) or having been built outside the cities and prior to annexation of their locations by the cities. The physical useful remaining life of each of C & U Poster's structures exceeds forty (40) years.

C & U Poster is a small company compared to Appellants, having only about 270 advertising structures, of which approximately 40 are in Urbana and 110 in Champaign, which cities comprise the only major markets in C & U Poster's advertising area. *Amici's* structures mostly consist of standardized poster panels (12 feet by 25 feet), painted bulletins (12 feet by 44 feet), and "junior panels" (6 feet by 12 feet). With few exceptions, *Amici's* structures are "off-premise" or "off-site" advertising, in that they convey messages pertaining to items not sold or offered at the structure's location.

Amici also own the land upon which approximately 64 of the approximately 150 Champaign-Urbana structures are located. Six of these parcels are singularly useful for outdoor advertising, being located in business or industrial districts, but being too small to be useful for anything else under the zoning ordinances (e. g., some of the parcels contain fewer than 1000 square feet).

C & U Poster employs an average of nine local employees, including management personnel, a sales man-

ager, a secretary, bill posters, a maintenance crew, and a sign painter. Approximately one-half of its revenues are brought in from outside the locality, but most of its overhead is spent locally, including all of its some $100,000.00 annual payroll. *Amici* pay local real estate and corporate personal property taxes as well as federal and state income taxes, as a result of their business.

Approximately 28 of the 40 structures in Urbana, and 40 of the 110 structures in Champaign, are legal and conforming under the State Highway Advertising Control Act. However, the demographical distribution of those structures—if only they were allowed to remain—would not be suitable for the operation of outdoor advertising in Champaign-Urbana.

The Popes and Mrs. Pope's parents have devoted most of their working lives to the development of their business of outdoor advertising. A substantial portion of the Popes' net worth is represented by their ownership of C & U Poster and its assets, which are largely in the form of its advertising structures.

2. The Cities of Champaign and Urbana:

Champaign and Urbana are "twin cities" having a joint population (including the University of Illinois) of approximately 120,000 persons. They comprise essentially one market area in a county containing approximately 165,000 persons in 1970. Champaign-Urbana is one of the leading downstate traffic centers, being served directly by three railroads, two airlines, bus lines, and at least four major state and federal interstates and highways. The cities are diverse, containing business, commer-

cial and industrial areas, residential areas, and agricultural areas. Their industrial communities are widely diversified, including paper products, sporting equipment, chemical supplies, castings, burial vaults, laboratories, food services, and many others. Champaign and Urbana are located in the heart of some of the most valuable and productive agricultural land in the world.

3. C & U Poster's Customers and Their Reliance on the Unique Medium of Outdoor Advertising:

C & U Poster's advertisers, which are both local and national, find value in conveying their messages to the communities via outdoor advertising. For example, the local banks have been advertising regularly with C & U Poster for over forty years. Two of them regularly advertise on five or more structures each; a third has maintained a large painted bulletin for about fifteen years. Their messages vary, but nearly always are designed to inform the public of various services they offer, current interest rates, the availability of loan-funds, new savings programs, etc.

Numerous local motels advertise on *Amici's* structures, both to inform the motoring public of their existence and to provide directions to their locations. Off-site advertising is uniquely suited to this task, as no other media can even begin to substitute for outdoor advertising in conveying such information to incoming or traveling motorists, with whom motels must communicate.

Several local restaurants rely heavily or exclusively on *Amici's* outdoor advertising, due to its unique ability to reach the customers necessary to the restaurant busi-

ness, and due to its low cost and high efficiency. For the same reasons, numerous agricultural products are advertised on *Amici's* structures in and about Champaign-Urbana.

Due to the substantially lower cost of advertising (per person exposed), several small businesses—particularly ones that are off the main thoroughfare—need and rely on outdoor advertising full-time, and would be placed at a severe competitive disadvantage if the medium were unavailable.

Additionally, C & U Poster regularly conveys information for local automobile dealers, motorcycle and snowmobile dealers, a local department store, savings and loan associations, campus pizza parlors, soft drinks, beer (although *Amici's* policies prevent their advertising hard liquor), programs at the University of Illinois, real estate agents and firms, cigarette manufacturers, insurance companies and agencies, the annual Ringling Brothers Circus, and many others.

Further, under a long-term policy, *Amici* regularly provide a substantial amount of "public service" advertising, some of which is paid for, but most of which is donated. For example, six locations have been donated in conjunction with a local bank for the United Way campaign. For many years, numerous posters and bulletins have been posted for churches, religious organizations, gasoline conservation ("Don't Be Fuelish", etc.), crime prevention, traffic safety ("Buckle Up for Safety"), the Rotary 4-Way Test, the Lion's Candy Day sales, the Salvation Army, the U. S. Army, Navy, Marine and Air Force Recruiting programs, the nursing profession, and many

others. *Amici* have requested the release of American hostages from Iran and have posted numerous political cartoons and comments. Preceding each election, a substantial portion of C & U Poster's business consists of political advertisements.

C & U Poster lives its motto: "If you have goods to sell and messages to tell, use outdoor."

4. The Champaign and Urbana Ordinances and the Illinois Highway Advertising Control Act:

Until 1971 in Urbana and 1975 in Champaign, the local ordinances allowed outdoor advertising structures in commercial and industrial areas, subject only to their satisfying wind load requirements, fire safety requirements, and the obtaining of permits for reasonable fees.

However, in 1975, Champaign passed an ordinance substantially similar to San Diego's, which purports to entirely prohibit all "off-premise" signs, *regardless of size,* from within the city boundaries, and which purports to require the removal of all such signs within five years without compensation. C & U Poster's structures are included within the prohibited class of "off-premise" signs.

In 1971, Urbana passed an ordinance which purports to exclude all off-premise signs from all zones but the industrial districts; imposes impossible restrictions on the industrial districts; and requires all non-conforming signs to be removed within five years, or if a permit has been granted, within ten years from the granting of the permit, all without compensation. Following a recent and sweeping re-zoning, all but about four of C & U Poster's structures are located in "commercial" districts (many of

which were formerly zoned "industrial"), and are thusly prohibited.[1]

Directly at odds with Champaign's and Urbana's sign ordinances is the preamble to the Illinois "Highway Advertising Control Act of 1971" (Illinois Revised Statutes, 1973, Ch. 121, Sec. 501, *et seq.*), which states in part as follows:

> The General Assembly further finds and declares that outdoor advertising is a legitimate, commercial use of private property adjacent to roads and highways; that outdoor advertising is an integral part of the business and marketing function, and an established segment of the national economy which serves to promote and protect private investments in commerce and industry and should be allowed to operate in *business areas.* (Emphasis added.)

The local ordinances—which would cause the total prohibition of outdoor advertising within their city lim-

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1 All but approximately four of *Amici's* forty structures must be removed from Urbana. The allowance of billboards in the industrial districts appears more generous than it is; because off-premise signs are deemed to be a "principal" use, they must be alone on the property. Only industrially zoned lots with at least 100 feet of frontage and 10,000 square feet of lot size qualify. Not only are the industrial zones generally useless for outdoor advertising because of their locations, but the use of such prohibitively large and expensive lots cannot be economically justified for outdoor advertising purposes. Outdoor advertising is uniquely suited as an "accessory" use, and has been customarily used for such in Champaign and Urbana. For instance, many local land and building owners generate rent income from C & U Poster's placement of a billboard on the edge of their lot or the wall of their building. Urbana's ordinance purports to disallow such accessory uses, and is tantamount to a prohibition of the medium of outdoor advertising from within its boundaries.

its—are clearly contradictory to the State law, which State law succinctly declares that outdoor advertising is a useful and legitimate business.

5. The Effects of the Champaign and Urbana Ordinances on C & U Poster, the Popes, and Their Advertisers:

Mr. and Mrs. Pope have spent much of their productive lives in building a business enterprise that has served the business and charitable community for many years. The enforcement of the ordinances in Champaign and Urbana will clearly wipe out not only their life-long efforts, but will deprive their advertisers from the dissemination of their messages via outdoor advertising.

It is estimated that the cost alone of removing C & U Poster's structures from Champaign and Urbana would exceed $45,000.00. The salvage value of their structures would be practically nil, and *Amici* would not be able to relocate their structures within these markets. The structures remaining in the surrounding small towns are not sufficient in number to justify *Amici's* continuing in business, and would have to be abandoned, removed, or sold, if possible, to companies in other cities. The economic effects of enforcing the ordinances would be devastating to *Amici*. If our federal and state constitutions are to have any meaning, neither the medium of outdoor advertising nor the assets which have been built up over some sixty years, should be so summarily destroyed.

Amici's advertisers—both local and national—would be forced to abandon an entire medium of communication in the Champaign-Urbana market place, whether they now

use advertising as a supplement to other media or rely exclusively on it for conveying their messages to the public. No longer would they be free to express and disseminate their ideas outdoors, and no longer would the public enjoy the right to receive information from the medium of outdoor advertising, all without regard to the value, merit, or worth of the information formerly disseminated by this medium of communication.

6. Amici's Present Litigation:

Amici have challenged their validity of both the Champaign and Urbana ordinances in the Circuit Court of Champaign County, Sixth Judicial Circuit, in lawsuits No. 76-C-22 and 76-C-1070. Two of the main issues raised in those suits are whether the First Amendment rights of *Amici* and their advertisers have been abridged, and whether the cities abused and exceeded their authority under the police power by adopting the ordinances. Champaign has agreed not to enforce its ordinance pending this litigation, and Urbana has been enjoined from enforcing its ordinance pending this litigation. The two lawsuits have been consolidated for trial, and the trial has been docketed for February, 1981.

CONCLUSION

The egregiously cavalier treatment of private property and the outdoor advertising industry by the San Diego City Council should not be countenanced. Outdoor advertising involves pure communication and dissemination of

ideas and information. Its communicative qualities are useful, economical, and unique. It is a legitimate and long-existent component of the local, state and national business communities, and must be declared to fall within the penumbra of the First Amendment so that courts and legislatures will be required to accord it the Constitutional rights to which it is entitled. If regulations are necessary, then they should regulate in a manner no more extensive than is necessary to further legitimate governmental interests. A total prohibition is overbroad and the California Supreme Court should be reversed.

Respectfully submitted,

KIP POPE
BUSCH, HARRINGTON & PORTER Law Offices

201 W. University Avenue, Suite 205
Champaign, Illinois 61820
(217) 352-4167

Attorney for Amici Curiae

80-195

IN THE

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October Term, 1980

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Appellees.

On Appeal from the Supreme Court of California

BRIEF OF THE STATES OF HAWAII, MAINE and VERMONT AMICUS CURIAE

WAYNE MINAMI
Attorney General of Hawaii
LAURENCE LAU
Deputy Attorney General
State Capitol Building
415 South Beretania
Honolulu, Hawaii 96813

RICHARD S. COHEN
Attorney General of Maine
CABANNE HOWARD
Assistant Attorney General
State House
Augusta, Maine 04333

M. JEROME DIAMOND
Attorney General of Vermont
BENSON D. SCOTCH
Assistant Attorney General
Pavilion Office Building
109 State Street
Montpelier, Vermont 05602

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INTRODUCTION

Pursuant to Rule 36(4) of this Honorable Court, the States of Hawaii, Maine and Vermont hereby submit this *amici curiae* brief in support of the appellee City of San Diego.

INTEREST OF THE AMICI STATES

In this case, appellants challenge the constitutionality of an ordinance of the City of San Diego which prohibits all off-premises outdoor advertising and requires the removal of existing billboards following the expiration of an amortization period. Appellants contend that the ordinance violates their rights to freedom of speech under the First and Fourteenth Amendments and constitutes an improper use of the police power in violation of the Fourteenth Amendment. The opinion of the Supreme Court of California, now before this Court for review, rejected these contentions, finding that the challenged ordinance is a constitutionally valid "time, place and manner" restriction on speech, and that it reasonably furthers the legitimate legislative goals of improving the appearance of the city, attracting tourism and eliminating traffic hazards.

The amici states have each enacted statutes which operate in essentially the same manner as the San Diego ordinance in prohibiting new off-premises outdoor advertising from being established within their borders, and providing for the compensated or amortized removal of existing billboards. In addition, the constitutionality of the statute of one of the amici states, Maine, has been challenged by the outdoor advertising industry on the same two grounds as the challenge which is being made here. The Maine Act was sustained by the United States District Court for the District of Maine, in an opinion relied upon below by the Supreme Court of California in this case. *John Donnelly & Sons v. Mallar*, 453 F.Supp. 1272 (D. Me. 1978). This decision was reversed by the United States Court of Appeals for the First Circuit *sub nom. John Donnelly & Sons v. Campbell*, __F.2d__ (1st Cir., December 22, 1980), but only with regard to the Act's prohibitions on non-commercial speech. Thus, any decision of this Court invalidating the San Diego ordinance on

either of the two grounds presented for review will result in the judicial invalidation of the entire Maine Act, and render unenforceable the Hawaii and Vermont statutes as well.

The following is a brief description of the principal features of the three statutes which will be affected by the Court's decision in this case:

1. Hawaii. The State of Hawaii provides for the conservation and development of public sightliness and the conservation and protection of its natural beauty in Hawaii Constitution, Article IX, Section 7 and Article XI, Section 1. Hawaii Revised Statutes, Sections 445-111 through 445-121 ban outdoor advertising devices with listed exceptions. Those exceptions allow on-premises advertising and allow political signs within a fifty-five day period that brackets elections, among other things. H.R.S. § 445-112(3), (4) and (11). The statute also allows counties to regulate the size, construction, color, illumination, location and appearance of signs allowed by the statute, among other things. H.R.S. § 445-113. Hawaii Revised Statutes, Sections 264-71 through 264-79 limit outdoor advertising along federal-aid and state highways to certain official directional and historic signs, landmark signs and certain on-premises advertising, and provided for the compensated removal of all non-conforming signs by 1975. The Hawaii Supreme Court has upheld the regulation of signs for aesthetic reasons alone, stating: "We accept beauty as a proper community objective, attainable through the use of the police power." *State v. Diamond Motors, Inc.*, 50 Haw. 33, 36; 429 P.2d 825, 827 (1967). Thanks in large measure to its laws, Hawaii is free of billboards as they are known on the mainland United States.

2. **Maine.** In 1977, the Maine Legislature passed the Maine Traveler Information Services Act, 23 M.R.S.A. § 1901, *et seq.*, with the same objectives as those of the City of San Diego (improving the appearance of the state, promoting tourism, and eliminating traffic hazards). See the legislative findings of fact set forth at Section 1901 of the Act. Like the San Diego ordinance, the Maine Act prohibits off-premises advertising, as defined, but specifies a number of categories of signs which are expected from the prohibition. 23 M.R.S.A. § 1913. Among these are political signs erected within three weeks of an election, primary or referendum. 23 M.R.S.A. § 1913(1) (I).

Next, the Act provides that those off-premises billboards lawfully in existence on the effective date of the Act which are visible from the federal interstate or primary highway systems shall be subject to compensated removal over a four year period ending January 1, 1982. 23 M.R.S.A. § 1915. Over 60 percent of these boards have been acquired as of the date of this brief, at a cost to the federal and state governments of over $2,500,000. All other off-premises signs, constituting approximately 20 percent of all boards in the state, are to be removed following the expiration of a six year amortization period on January 1, 1984. 23 M.R.S.A. § 1916. Finally, the Act provides for the erection of tourist information centers and standardized official business directional signs for the assistance of the traveling public. 23 M.R.S.A. §§ 1905, 1906, 1909-12, 1918.

3. Vermont. The Vermont Legislature passed the Vermont Tourist Information Services Act with amendments in 1969, 1975, 1977 and 1979. 10 V.S.A. § 481 *et seq.* The Act has the same purposes as the San Diego ordinance of improving the state's appearance, reducing traffic hazards and promoting tourism. See the legislative findings of fact set out at 10 V.S.A. § 482. The Vermont Act, like the San Diego ordinance, prohibits off-premises advertising, but exempts certain categories of signs. 10 V.S.A. § 494. Unlike San Diego, Vermont makes no special provision for political campaign signs. Vermont also provided for compensation when the billboard was on a state highway and compensation was mandated by Federal law, 10 V.S.A. § 496, and has expended over $500,000 in state and federal funds to acquire boards in this category. For other off-premises signs, a five-year amortization period was allowed. 10 V.S.A. § 496. That period expired for all affected signs on March 23, 1973. The Act also provides for alternative means of communicating with the traveling public, including licensing of standard official business directional signs, tourist information centers, and state published guidebooks and maps. Thus, Vermont has completed the change from its former system of outdoor advertising to its present system of tourist information services. The public and advertisers of the state have completed the adjustment and operated under the present system for over seven years.

CONCLUSION

Each of these amici has reviewed the brief of the City of San Diego and the brief for the United States, *amicus curiae*. Each amici respectfully joins the contentions of the City of San Diego and the United States that the San Diego ordinance does not violate the First Amendment guarantee of freedom of speech and constitutes a valid exercise of the police power, and therefore urges that the judgment of the Supreme Court of California be affirmed.

Respectfully submitted,

WAYNE MINAMI
Attorney General of Hawaii
LAURENCE LAU
Deputy Attorney General
State Capitol Building
415 South Beretania
Honolulu, Hawaii 96813

RICHARD S. COHEN
Attorney General of Maine
CABANNE HOWARD
Assistant Attorney General
State House
Augusta, Maine 04333

M. JEROME DIAMOND
Attorney General of Vermont
BENSON D. SCOTCH
Assistant Attorney General
Pavilion Office Building
109 State Street
Montpelier, Vermont 05602

Dated: December 24, 1980.

No.80-195

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v.

CITY OF SAN DIEGO, *et al.*

On Appeal From The Supreme Court of California

BRIEF OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS AMICUS CURIAE

John Dekker, Director of Law
City Hall, 13th Floor
455 North Main Street
Wichita, Kansas 67202

Roy D. Bates, City Attorney
P.O. Box 147
Columbia, South Carolina 29217

James B. Brennan, City Attorney
800 City Hall
Milwaukee, Wisconsin 53202

Aaron A. Wilson, City Attorney
28th Floor - City Hall
Kansas City, Missouri 64106

Henry W. Underhill, Jr.,
City Attorney
600 East Trade Street
Charlotte, North Carolina 28202

J. LaMar Shelley, City Attorney
48 North Macdonald Street
Mesa, Arizona 85201

William R. Quinlan, Corporation
Counsel
511 City Hall
Chicago, Illinois 60602

Benjamin L. Brown, City Solicitor
101 City Hall
100 N. Holiday Street
Baltimore, Maryland 21202

(Attorneys continued on inside front cover)

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

George F. Knox, Jr., City Attorney
174 E. Flagler Street
Miami, Florida 33131

Max P. Zall, City Attorney
City & County Building
Denver, Colorado 80202

Allen G. Schwartz
Corporation Counsel
100 Church Street, Room 6A-11
New York, New York 10007

Lee E. Holt, City Attorney
Dallas City Hall, 1500 Marilla
Room 7BN
Dallas, Texas 75201

Burt Pines, City Attorney
1800 City Hall East
Los Angeles, California 90012

Walter M. Powell,
Municipal Counselor
309 Municipal Building
Oklahoma City, Oklahoma 73102

Roger F. Cutler, City Attorney
101 City & County Building
Salt Lake City, Utah 84111

Jeffrey S. Goddess, City Solicitor
City-County Building, 9th Floor
800 French Street
Wilmington, Delaware 19801

Conard B. Mattox, Jr.
City Attorney
300 City Hall
Richmond, Virginia 23219

Charles S. Rhyne
William S. Rhyne
1000 Connecticut Ave., N.W.
Suite 800
Washington, D.C. 20036
(202) 466-5420
Counsel of Record

Attorneys for Amicus Curiae
National Institute of Municipal
Law Officers

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1980

No. 80-195

METROMEDIA, Inc., *et al.*,
Appellants,

v.

CITY OF SAN DIEGO, *et al.*

On Appeal From The Supreme Court of California

BRIEF OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

Pursuant to Rule 36 of this Court, the National Institute of Municipal Law Officers (NIMLO) respectfully submits this brief as amicus curiae in support of appellee, City of San Diego. NIMLO is an organization composed entirely of municipalities, which are political subdivisions of states. Founded in 1935, it now has a membership of over 1500 municipalities located in all 50 states and the District of Columbia. Each member municipality participates through its chief legal officer, usually designated as city attorney, corporation counsel, city counselor, etc., and the chief legal officer's assistants.

As the chief legal officers of their cities, those who operate NIMLO for their municipalities are responsible for the enforcement of billboard regulation measures, such as the San Diego ordinance before this Court. The assertion of the appellants in this case is essentially that cities cannot regulate billboards, either to prevent traffic hazards, or for aesthetic purposes. Such a holding would leave cities unable to serve the needs of their citizens and visitors.

NIMLO believes that the opinion of the Supreme Court of California here on appeal properly balances the interests of the appellee billboard proprietors and their customers, on the one hand, and local governments and their citizens, on the other. NIMLO therefore offers its views in support of the affirmance of that judgment.

Consent to the filing of this brief has been granted by counsel for both parties. Copies of these letters of consent have been lodged with the Clerk of this Court.

SUMMARY OF ARGUMENT

A. San Diego's ordinance banning billboards throughout the city is a reasonable exercise of the police power to combat a serious problem of traffic safety and to promote the combination of aesthetic betterment for its own sake and the preservation of public and private property values which accompanies aesthetic betterment. San Diego's explicit and detailed Planning Commission report on the problem and need mirrors the concerns of other cities, and of the Congress, in banning billboards. All of this evidence supports the remedy chosen by the San Diego City Council in the challenged ordinance.

B. Far from ignoring the First Amendment issue, as appellants contend, the California Supreme Court carefully

balanced the governmental and commercial speech interests involved in this case. Indeed, one of the examples of noncommercial speech relied on by appellants was given primacy by the California Court, and by this Court last Term, in *Prune Yard Shopping Center* v. *Robins,* 447 U.S. ____, 100 S. Ct. 2035 (1980). It is thus clear that the courts will protect both commercial and noncommercial speech by considering both the speech and the dangers of the medium in which it is expressed. That is precisely what the Supreme Court of California has done in this case, and the judgment should be affirmed.

ARGUMENT

It is important at the outset to make clear what is, and what is not, involved in this case.

Appellants are the proprietors of 500 to 800 advertising billboards within the City of San Diego, Joint Stipulation ¶13, J.S. App. 122a, which they value "as a part of an income-producing system," *id.*, ¶18, J.S. App. 123a. The appellants challenge the facial validity of a 1972 ordinance prohibiting the erection of billboards and requiring, over a variable amortization period, the removal of existing billboards.

The judgment here for review necessarily did not consider whether the absence of billboards would inhibit any particular communication. J.S. App. 23a, n.14. The California Supreme Court thus did not find it necessary to evaluate the relative economy and efficiency of other advertising media.[1] On the other hand, the California Court did conclude that billboards pose a hazard, and

[1]In any event, appellants have described their medium as ideologically indifferent, "made available to 'all-comers', in a fashion similar to newspaper or broadcasting advertising." Joint Stipulation ¶ 22, J.S. App. 123a.

were regulable under a government power (zoning) not similarly applicable to other advertising media such as leaflets, soundtrucks and newspapers.[2]

To overcome the defects of their medium, the appellant billboard proprietors assert in both of their Questions Presented that the Constitution bars the City of San Diego, or any other city, from prohibiting billboards in furtherance of the cities' goals of reducing traffic hazards and improving the aesthetic qualities of their environs. Appellants argue, as they must to support reversal, that billboards are a constitutionally essential medium for advertising.[3]

In their first Question particularly, the appellants ask this Court to declare billboards a "distinct" and "valuable" medium of advertising. Apparently, the appellants hope the policy judgment of this Court will be more hospitable to billboards than were those in city councils throughout the nation. That hope, however, is at odds with the proper role of the courts in reviewing legislation.[4]

The appellants then argue from their second Question Presented, that there exists an insufficient connection between a prohibition of billboards and the legitimate government purposes of safety and aesthetic preservation.[5]

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[2]J.S. App. 24a. "[A] billboard is a large, immobile, and permanent structure. . . ." *Ibid.*

[3]Br. 22, 24-25.

[4]Certainly, appellants' description of San Diego as a city of beaches, parks, a seaport, hundreds of miles of streets, highways and freeways, a large industrial area, J.S. 3-4, suggests the practical impossibility of this Court's amending the zoning code of each city which has banned billboards. Each such ban represents a particularized legislative assessment of the peculiarly local characteristics appellants have enumerated. We offer examples of these localized assessments, *infra*.

[5]Thus, we address most particularly appellants' brief, pp. 41-45.

SAN DIEGO'S ORDINANCE PROPERLY ADDRESSED THE TRAFFIC HAZARDS AND AESTHETIC BLIGHT BILLBOARDS CAUSE CITYWIDE.

We begin with the proposition that this Court has committed itself to uphold legislation where there are "plausible reasons,"[6] or "a correlation between the classification and either the actual purpose of the statute or a legitimate purpose that we may reasonably presume to have motivated an impartial legislature."[7]

Both the actual purpose of the San Diego billboard ordinance and the presumed purpose, gleaned from similar legislative acts by the Congress and in other states, fully show that "the adverse impact [on the billboard proprietors here] may reasonably be viewed as an acceptable cost of achieving a larger goal,"[8] namely the twin goals of traffic safety and environmental betterment.[9]

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[6] *United States Railroad Retirement Board* v. *Fritz*, No. 79-870, slip op. at 11 (Dec. 9, 1980).

[7] *Id.* Stevens, J., concurring, slip op., at 2.

The judicial presumption of a legitimate purpose or means is quite different from the "presumption of validity" which appellants attack, Br. 41, n.**. The misuse of the latter presumption is an abdication of judicial review. But the former presumption merely (in this case) imputes to a particular city council what is common knowledge among common councils and common citizens nationwide, that billboards are distracting (if they are used enough to be profitable) and unsightly. Indeed, these propositions were the subject of judicial notice at trial in this case R. (Clerk's Tr.) 767. The trial court made no findings contrary to the proffered facts noticeable. J.S. App. 95a-97a.

In this regard, the office of our brief is to confirm the obvious: that cities nationwide have reached the same conclusion respecting billboards as did San Diego.

[8] *Ibid.*

[9] Thus, neither we nor the City appellee are limited to the citation of precedent such as *Suffolk Advertising Co.* v. *Hulse*, 439 U.S. 808 (1978), to support affirmance. *(Footnote continued on next page).*

A. The City's Expressed Purposes Are Congruent With Findings by Other Cities and by the Congress.

1. One purpose of San Diego's ordinance was "to eliminate excessive and confusing sign displays [and] to eliminate hazards to pedestrians and motorists brought about by distracting sign displays. . . ." San Diego Mun. Code § 101.0700, at A (reprinted, J.S. App. 106a).

San Diego chose a clear rule to accomplish this "proper objective[ ] for the exercise of the city's police power,"[10] namely, to permit most on-premises signs and to forbid off-premises advertising signs.[11] The rule is applied uniformly throughout the city.[12]

(Footnote continued)

Even if this Court regarded the constitutionality of billboard bans as being presented on a clear slate, the judgment of the California Court below should be affirmed.

[10]The quotation is from the opinion of the California Supreme Court, J.S. App. 7a.

[11]The off-premises signs permitted under the ordinance, such as subdivision directional signs and bench signs, are clearly different from advertising billboards in their potential hazard to pedestrians and motorists.

[12]Apparently, appellants would argue that an ordinance consigning their billboards to only the industrial and commercial areas of San Diego would render their business as useless as does the citywide billboard ban. Appellants assert, Br. 6-7, that billboard advertising is most effective on a saturation basis throughout all parts of a metropolitan area.

Since the appellants would use the entire city area for saturation billboard advertising, there is no possibility "the governmental interest could be served as well by a more limited restriction on commercial speech," *Central Hudson Gas & Elec. Co.* v. *Public Serv. Comm'n*, 448 U.S. ____, ____, 100 S.Ct. 2343, 2350 (1980), than a citywide billboard ban. Thus, the appellants' argument that a less-intrusive regulation was available to the City, Br. 28-30, is disingenuous.

All of appellants' billboards are in the commercial and industrial areas of San Diego,[13] a highly concentrated part of the city.[14] They are designed to, and do, attract the attention of motorists.[15] Therefore, appellants' billboards present the most dangerous possibility of billboard hazard. Clearly, some city regulation was compelled

San Diego addressed the billboard problem within the context of the universe of signs, including roof top, identification, projecting, and freestanding signs, and pennants. Its Planning Commission prepared a March 1971 report to the City Council: Summary Report-City Wide Sign Study.[16] The study focused on the traffic hazard created by "signs attempt[ing] to flag down motorists travelling on high speed and/or heavily congested roadways."[17] Photographs were included, among them one of a commercial strip containing so many signs that the report concluded: "businesses not only attempt to outshout their neighbors, they frequently appear to be outshouting themselves."[18]

The Planning Commission considered the experience of 264 California cities[19] in concluding that "the case against

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[13]Joint Stipulation ¶ 20, J.S.App. 123a.

[14]The commercial and industrial zones include only 2.8% of the city area. Joint Stipulation ¶ 9, J.S. App. 121a; Brief of Appellants, at 5. Yet, 22.4% of city citizens work in manufacturing, and 17.5% work in retail trade. Joint Stipulation ¶ 10, J.S.App. 121a.

[15]R. (Clerk's Tr.) 145, 488.

[16]The report, and covering memorandum, were attached to appellants' summary judgment papers, R. (Clerk's Tr.) 703.

[17]R.706.

[18]R.707.

[19]R.708.

[billboards] has been building for many years."[20] The Commission concluded that billboards, as well as rooftop, large projecting, and freestanding signs should be banned citywide.[21]

This determination by the City of San Diego – which underlies the ordinance challenged in this case – is congruent with determinations made both earlier and later by other cities, and by the Congress.

For example, by 1974, 104 Vermont cities had enacted ordinances controlling billboards.[22] A February 15, 1977, ordinance of Germantown, Tennessee[23] recited that "signs have had to become more aggressive, more numerous, more obtrusive in order to maintain the same level of attention." Among the purposes of Naperville, Illinois,' 1974 ordinance[24] was "[t]o protect the public investment in streets and highways by reducing distractions that may increase traffic accidents."

Dallas, Texas, "determined that the proliferation of non-premise signs oriented to be visible from the high-speed freeways and expressways surrounding the central business district distracts the attention of motorists and unnecessarily complicates the decision making required of motorists on the freeways. . . ."[25]

The Congress, in enacting Title 23 of the United States Code in Pub.L.No. 85-767, declared in § 131(a) that national policy forbade billboards near interstate highways.

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[20] *Ibid.*

[21] R.716.

[22] Council of State Governments, Innovations: Vermont's New Signs of the Times, at 1 (1979).

[23] Ord. No. 1976-5, amending City Code § 4-601 et seq.

[24] Ord. No. 74-23, amending Municipal Code § 10.1301 et seq.

[25] Ord. No. 14649 (1974), amending City Code § 41-36 et seq.

In 1965,[26] 23 U.S.C. § 131(a) was amended to its present form, expressing the finding that "the erection and maintenance of outdoor advertising signs. . . should be controlled in order. . .to promote the safety. . .of public travel, and to preserve natural beauty."

In explaining how § 131 would be administered,[27] the Secretary of Commerce referred to "unchecked proliferation which . . . results in a public eyesore," and promised to adapt a complex mechanism of federal-state agreements on billboard spacing and lighting to "new and ingenious types of signs . . . in the future which may or may not present a hazard."[28] Spacing, particularly, was necessary "to prevent a conglomeration of highway signs in the vicinity of an intersection of [sic] interchange which might involve a traffic hazard."[29]

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[26]Pub.L.No. 89-285, § 101, 79 Stat. 1028.

[27]The specific point to be administered was the application of a provision, § 131(d), permitting billboards in commercial and industrial zones, to unzoned land. H.R.Rep.No. 1084, 89th Cong., 1st Sess., reprinted in 1965 U.S. Code Cong. & Adm. News, at 3713.

[28]H.R.Rep.No.1084, 89th Cong., 1st Sess., reprinted in 1965 U.S. Code Cong. & Adm. News 3710, 3714.

[29]*Ibid.* Congress certainly was entitled to insist on a more complicated, and more costly, form of billboard regulation for highway fringes than San Diego has chosen for its own exclusive area. And, the federal view was given primacy in its own proper area in this case. J.S.App. 26a. This does nothing to detract from three propositions, however. First, even Congress saw no need (or no possibility) of the kind of billboard-by-billboard factfinding appellants suggest, Br. 42, in order to ban their 800 San Diego billboards. Second, appellants no doubt would argue that their First Amendment rights would be impaired as fully if they were paid to forswear billboard advertisement as they assertedly are under the San Diego ordinance. So, the federal preference for compensated billboard removal, see H.R.Rep.No. 95-1485, 95th Cong., 2d Sess. 15 (1978), does not advance appellants' cause here. Third, Congress in 1965 clearly recognized the same safety and aesthetic problems, inherent in each billboard site, which animated San Diego to action in 1972.

2. San Diego's second purpose in banning billboards was "to preserve and improve the appearance of the City as a place in which to live and work." San Diego Mun. code § 101.0700, at A (reprinted, J.S. App. 106a).

The California Supreme Court found this governmental purpose to be furthered by a billboard prohibition in both noncommercial and commercial areas in San Diego, J.S.App. 13a-14a.

In its planning study, the City of San Diego was motivated in part by the incongruity of spending city funds to install utilities underground (to enhance the aesthetic quality of the city), while permitting billboards to remain.[30]

In this respect, recognizing the connection between aesthetic betterment and the preservation of both private and public improvements, San Diego was acting similary to other cities.

Naperville, Illinois regulated billboards in part "[t]o preserve the value of private property by assuring the compatibility of street graphics with surrounding land uses."[31] Cities have assessed their unique aesthetic needs, as South Lake Tahoe, California, did in finding after public hearings:

> "The city is situated in a scenic mountain-forest-lake with a reputation as a restful resort community whose economic well-being is primarily dependent upon the attraction of tourists from all parts of the world. Recognizing that the city is one of the country's

[30]R. (Clerk's Tr.) 705.

[31]Ord. No. 74-23, amending Municipal Code § 10.1301 et seq.

foremost resorts, it is found that the proper control of signs is of particular importance."[32]

Akron, Ohio, found that "experience has demonstrated that billboards are frequently permitted to deteriorate and remain in a state of disrepair resulting in a blighting effect...," which was seen to conflict with the City's downtown rehabilitation program.[33]

3. It is not necessary to suggest that the City Council of San Diego knew of these ordinances to assert the obvious: by 1972 regulation of billboards for both safety and aesthetic purposes was a national imperative of government at all levels.

B. The California Supreme Court Fully Considered the Billboard Proprietors' Countervailing Interest, and Properly Found It Inferior to the City's Expressed Purposes.

Appellants' asserted First Amendment interests neither discredit nor outweigh the strong governmental interest in a billboard ban.[34]

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[32]Ord.No. 521 (1978), amending Municipal Code § 25.1 et seq. Palm Springs, California, was similarly motivated. Ord. No. 776 (1967), adding Ordinance Code § 8100 et seq.

[33]Ord. No. 426-1979, adding Planning and Zoning Code §1276.54.

[34]The provisions of San Diego's ordinance respecting the removal of existing billboards are not before the Court in No. 80-195. The ordinance was challenged on its face, and appellants make no assertion that the amortization schedule itself is facially irrational.

In any event, the provisions allowing billboard proprietors a period to amortize their commercial investment are reasonable.

Appellants suggest[35] that the California Supreme Court, beguiled by this Court's summary disposition in *Suffolk Outdoor Advertising Co.* v. *Hulse,* 439 U.S. 808 (1978), gave less than adequate review to the tension between San Diego's interests and those of the billboard proprietors and their customers.

Appellants are misguided, and the First Amendment issue is here on review, not as an original proposition. The balance of interests in this case has been judicially approved once already, and adversely to appellants.

It is noteworthy that one of the subjects about which appellants assert that billboard advertising is constitutionally required, "to denounce the United Nations", J.S.5, was the subject of a similar balancing by the Supreme Court of California, affirmed last Term in *PruneYard Shopping Center* v. *Robins,* 447 U.S. ____, 100 S.Ct. 2035 (1980). There, the California Court held that a shopping center owner's interest was subordinate to the speech interest of students protesting a United Nations resolution.[36].

Here, the California Court held that the billboard companies' vicarious assertion of that U.N.-comment interest was inferior to San Diego's interest in traffic safety and environmental enhancement.

Certainly, the two cases taken together substantially discredit appellants' assertion here that the California Court was insensitive to the message appellants' customers pay to broadcast.[37]

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[35]Br. 33.

[36]This Court summarized the facts at 100 S.Ct. 2038.

[37]Rather, *PruneYard* merely confirms what a reasoned appraisal of reality suggests for this case: that billboards are principally a medium for the more commercial appeals, alternatives, many free or using volunteers, being chosen by less well-heeled advocacy groups.

The two cases show that Court's careful appraisal of the competing interests, as they arise from the facts of the cases. The City's ordinance strikes a similar balance.

For example, appellants assert that the message broadcast from billboards changes frequently (according to payment received by the appellants),[38] and offer the following examples, among others: " 'a particular sign may advertise . . . a candidate for mayor the next month . . . a new car the fourth month, and a union grievance the fifth month.' " J.S.5.[39]

Under the congeries of prohibitions and exceptions in San Diego's ordinance, J.S.App. 112a, the mayoral candidacy may be advertised temporarily, but the car and the grievance must be advertised in some fashion other than off-premises signs.[40]

It is our submission that, given the governmental interest served by a billboard ban, and the rational (even

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[38]Nothing in the record suggests that appellants make their medium available to causes, however worthy, on any other than a fee-paid basis.

[39]See also Brief of Appellants, at 25.

[40]Appellants' long recitation of the protection afforded less hazardous and less permanent media, Br. 21-27, confirms that purveyors of noncommercial messages will be able to communicate, without billboards, unhindered by the City of San Diego.

In any event, the record here does not support an argument that the candicate, the car seller, and the union grievants did not, or could not, use advertising media other than billboards. Common sense and experience suggests quite the opposite. Thus, this case is distinguishable from *Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U.S. 85, 93 (1977), relied on by appellants, Br. 26.

super-rational) relationship between that end and the means chosen here, the balance struck by San Diego's City Council is a constitutionally permissible one. *Lotze* v. *Washington*, 444 U.S. 921 (1979).

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

John Dekker, Director of Law
City Hall, 13th Floor
455 North Main Street
Wichita, Kansas 67202

James B. Brennan, City Attorney
800 City Hall
Milwaukee, Wisconsin 53202

Henry W. Underhill, Jr.,
City Attorney
600 East Trade Street
Charlotte, North Carolina 28202

William R. Quinlan, Corporation
Counsel
511 City Hall
Chicago, Illinois 60602

Roy D. Bates, City Attorney
P.O. Box 147
Columbia, South Carolina 29217

Aaron A. Wilson, City Attorney
28th Floor – City Hall
Kansas City, Missouri 64106

J. LaMar Shelley, City Attorney
48 North Macdonald Street
Mesa, Arizona 85201

Benjamin L. Brown, City Solicitor
101 City Hall
100 N. Holiday Street
Baltimore, Maryland 21202

George F. Knox, Jr., City Attorney
174 E. Flagler Street
Miami, Florida 33131

Max P. Zall, City Attorney
City & County Building
Denver, Colorado 80202

Allen G. Schwartz
Cororation Counsel
100 Church Street, Room 6A-11
New York, New York 10007

Lee E. Holt, City Attorney
Dallas City Hall, 1500 Marilla
Room 7BN
Dallas, Texas 75201

Burt Pines, City Attorney
1800 City Hall East
Los Angeles, California 90012

Walter M. Powell, Municipal Counselor
309 Municipal Building
Oklahoma City, Oklahoma 73102

Roger F. Cutler, City Attorney
101 City & County Building
Salt Lake City, Utah 84111

Jeffrey S. Goddess, City Solicitor
City-County Building, 9th Floor
800 French Street
Wilmington, Delaware 19801

Conard B. Mattox, Jr.
City Attorney
300 City Hall
Richmond, Virginia 23219

Charles S. Rhyne
William S. Rhyne
1000 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036
(202) 466-5420
Counsel of Record

Attorneys for Amicus Curiae
National Institute of Municipal
Law Officers

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On Appeal From The Supreme Court Of California

BRIEF OF THE OUTDOOR ADVERTISING ASSOCIATION OF AMERICA AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

ERIC M. RUBIN
Counsel of Record
JEFFREY S. SALTZ
WOLF, BLOCK, SCHORR AND SOLIS-COHEN
1100 Connecticut Avenue, Suite 920
Washington, D.C. 20036
(202) 861-0870

Attorneys for the Outdoor Advertising Association of America, Amicus Curiae

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On Appeal From The Supreme Court Of California

BRIEF OF THE OUTDOOR ADVERTISING ASSOCIATION OF AMERICA AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

INTEREST OF AMICUS CURIAE

This brief is submitted by the Outdoor Advertising Association of America (OAAA) as *amicus curiae*. The consent of each party to the filing of the brief has been secured pursuant to Rule 36.2 of this Court. The brief supports the position of appellants in this case and urges reversal of the decision below.

The OAAA is the trade association of the standardized outdoor advertising industry in the United States. Its functions include the promotion of outdoor advertising as a means of public communication, the collection of data concerning the cost and effectiveness of outdoor advertising and of other mass media, the promulgation of a code of recommended practices which recognizes the importance of locating outdoor advertising signs only in commercial and industrial areas, and support for federal, state and local regulations which implement that policy.

The OAAA's membership is composed of one hundred and sixty-nine companies which serve 7,900 distinct local areas throughout the United States. These members are principally small, locally based family-owned businesses which serve a single locality or contiguous localities within a particular state. Other OAAA members are relatively large companies which operate on a regional and national basis. The broad geographic scope of the outdoor advertising industry is reflected in the listing of OAAA members and the location of their principal offices in Appendix B.

The members of the OAAA have an intense interest in this case since the central issue before the Court is whether a municipality may use its police power to totally suppress outdoor advertising. The Court's dis-

position of this appeal will have an immediate impact on the continued existence of the outdoor medium in California. 17 counties and 209 cities within that state have already completely prohibited outdoor advertising. Many of these ordinances have not been directly challenged because they preclude billboards from localities which are particularly scenic or principally residential in character without appreciable commercial or industrial activity. But there is also substantial litigation presently pending in the California Courts challenging restrictions which would either limit, or totally eliminate outdoor advertising from commercial or industrial areas in many major cities or counties. Legislation similar to the San Diego ordinance is also under consideration in other California municipalities. The Court's disposition of this appeal will directly determine the validity of all of these measures and thus will have a decisive impact on whether the outdoor medium will be suppressed within California.

The implications of this case are equally decisive with respect to the continued viability of outdoor advertising throughout the United States. Many localities now permit outdoor advertising within narrowly defined areas, principally in commercial and industrial zones. Nevertheless, outdoor advertising is regularly subject to efforts at its suppression. The Court's disposition of the instant appeal will determine the scope of future regulation of outdoor advertising and the vulnerability of the medium to moves for its elimination on a national basis.

Finally, aside from the strictly legal considerations involved, this appeal will have decisive effect on the

broad range of business decisions which will also determine the extent to which the outdoor advertising industry will remain a significant medium. Simply stated, a legal environment which countenances the total abolition of outdoor advertising without just compensation for the loss of investment inevitably will chill the industry's access to capital. Indeed, such circumstances would compel many outdoor advertising companies themselves to seriously question whether they can continue to justify the expenditures necessary to maintain and improve existing sign structures when measured against alternative investment opportunities.

It is not the purpose of this brief to discuss every First Amendment issue that may be raised by the San Diego ordinance nor to respond to every argument that could be presented by the appellee. Rather, the OAAA believes it can best be of assistance to the Court by drawing on its expertise to explain the singular characteristics of outdoor advertising that make it a key means of communication which cannot readily be replaced. To do this, the OAAA has assembled advertising cost data for the principal mass media from standard references widely recognized as authoritative and has prepared a series of comparisons of intermedia costs in six sample markets. These comparisons are discussed in this brief and are set forth in detail in Appendix A hereto. This data documents the extraordinary differential in cost-efficiency between outdoor advertising and the other mass media and demonstrates the true lack of viable alternative channels for mass communications for those who rely on the medium.

Accordingly, the Outdoor Advertising Association of America respectfully submits this brief in support of the appellants and to impress upon the Court the inevitable threat to protected expression which would flow from the prohibition of outdoor advertising.

ARGUMENT

The San Diego ordinance conflicts directly with a broad range of decisions by this Court which have consistently rejected measures that completely ban a distinct form of communication. *Lovell* v. *City of Griffin,* 303 U.S. 444, 452 (1938) (distribution of circulars, handbills, etc.); *Schneider* v. *New Jersey,* 308 U.S. 147 (1939) (handbills); *Martin* v. *City of Struthers,* 319 U.S. 141, 143 (1943) (door-to-door solicitation); *Saia* v. *New York,* 334 U.S. 558 (1948) (sound trucks); *Cf. Police Department* v. *Mosley,* 408 U.S. 92 (1972) (picket signs); *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205 (1975) (exhibition of nudity at drive-in movie theaters); *Town of Southampton* v. *Troyer,* 49 U.S.L.W. 3371 (U.S. Nov. 17, 1980) (door-to-door solicitation). The decisions of this Court reflect a studied effort to husband the limited channels for public expression in recognition of the fact that meaningful access to the means of communication is the undergirding of protected expression itself. A speaker must have the opportunity to "reach the minds of willing listeners and to do so there must be an opportunity to win their attention." *Kovacs* v. *Cooper,* 336 U.S. 77, 87 (1949). The Court has tolerated the imposition of restraints on a means of communication only where the government can demonstrate that such controls are the least encompassing method of serving a compelling, and well documented public interest. *Cf. First National*

Bank of Boston v. *Bellotti*, 435 U.S. 765 (1978); *Buckley* v. *Valeo*, 424 U.S. 1, 25 (1976) (per curiam). But the Court's decisions have not condoned the complete suppression of an entire medium.

By invoking time, place and manner analysis, the California Supreme Court has not found a rationale for police power actions which totally suppress speech through a particular means of communication. Justification for a total ban on outdoor advertising does not repose in the fact that other media remain unaffected by the prohibition. This Court has never been persuaded by assertions that "the speakers' listeners could come by his message by some other means." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 n.5 (1976). Liberty of expression may not be prohibited on the basis that it may be exercised in some other place. *Schneider* v. *New Jersey*, 308 U.S. 147 (1939).

I. San Diego's Prohibition of Outdoor Advertising Cannot Be Justified by the Existence of Other Media Which Are Not Viable Cost Effective Alternatives.

The California Supreme Court bottoms much of its decision on the assumption that the elimination of outdoor advertising would merely signal a migration of users of this medium to other forms of communication. The conclusion has no basis in the trial record and conflicts diametrically with the stipulations of the parties themselves regarding the impact of the San Diego ban.

> 28. Outdoor advertising increases the sales of products and produces numerous direct and indirect benefits to the public. Valuable commercial, political, and social information is communicated

> to the public through the use of outdoor advertising. Many businesses and politicians and other persons rely on outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitally [sic] expensive. Jurisdictional Statement, Appendix H, p. 125a-126a.

The California Court's suppositions do not satisfy this Court's insistence that restrictions on a means of communication can be sustained only when grounded on a concrete assessment of whether alternative media provide realistic avenues for speech that has been foreclosed by such constraints. Certainly, the California Court's support for San Diego's prohibition of an entire medium cannot withstand this scrutiny. Thus in *Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U.S. 85 (1977), the Court rejected the contention that "For Sale" signs could be prohibited because alternative means of advertising were available:

> Although in theory sellers remain free to employ a number of different alternatives, in practice realty is not marketed through leaflets, sound trucks demonstrations, or the like. The options to which sellers realistically are relegated—primarily newspaper advertising and listing with real estate agents—involve more cost and less autonomy than "For Sale" signs; are less likely to reach persons not deliberately seeking sales information; and may be less effective media for communicating the message that is conveyed by a "For Sale" sign in front of the house to be sold. The alternatives, then, are far from satisfactory. Id. at 93 (citations omitted)

Like every medium of communication, outdoor advertising has certain distinct capabilities and characteristics which make it unique. The fixed written and

pictorial copy of a billboard is evocative because it is succinct and directed. A radio advertisement must be structured differently in order to command the same attention and a strategy for repetition must be established if it is to have substantial impact. Indeed the print copy used in newspaper advertisement must be designed differently than outdoor advertising copy in order to negate the "clutter" resulting from advertisements and editorial content. Schwartz, *The Responsive Cord* (Doubleday 1974).

Media also project to an audience through different forums. Television, direct mail and newspapers are generally regarded as so called in-home media because they reach the audience in the privacy of the home or workplace. The significance of radio is closely tied to automobile travel. Outdoor advertising is predicated on the dissemination of information in a wholly public environment and is classified as an out-of-home media. This welter of factors color a speakers' choice of the medium which best projects his particular message. But perhaps the most fundamental measure of a speaker's real options is the actual comparative costs of disseminating his message in each medium.

The simple fact is that outdoor advertising is the least expensive and most cost-efficient mass medium available for the broad dissemination of a message within a geographical area. The extraordinary cost differential between outdoor advertising and the other mass media is illustrated in the detailed analysis of media costs set forth in Appendix A. This data is presented in terms of comparative advertising costs for outdoor, radio, TV, and newspaper advertising in six sample markets—Denver, Colorado; Waco, Texas; Chicago, Illinois; Minneapolis, Minnesota; Birming-

ham, Alabama; and Rochester, New York.[1] The statistics involved have been derived directly from published, generally accepted standard reference services which audit the potential audience exposure for every mass media outlet operating in the United States. These reporting services are regarded as authoritative by the individual media involved and are customarily relied upon by media planners.

Appendix A presents this information through two tables. The first shows the cost to an advertiser of achieving a specific level of exposure for a message in each medium. The second shows the audience exposure which can be achieved through comparable expenditures in each medium. Both tables state audience exposure in terms of Gross Rating Points (GRPs), the standard measure used by media planners as an indication of relative media efficiency.[2] The samples are based upon media "buys" which show each medium in its most favorable light in terms of cost and audience coverage. Although different combinations of time slots, page sizes, and station selections could be studied, Appendix A accurately portrays the extraordinary divergence between the cost of outdoor advertising and the costs of all other major mass media which would emerge from any comparison.

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[1] Like virtually all media (except national television and magazines), outdoor advertising is essentially a local medium, purchased to reach an audience within a given local geographical area. Accordingly, Appendix A compares outdoor advertising and other media devoted to local advertising—newspapers, radio, and the limited sector of television time, known as "spot" TV, devoted to local advertising.

[2] GRPs represent the proportion of a given audience reached by a medium over a particular duration of time. For a full description, see Note on Methodology and Sources, page 3a *infra*.

The comparisons set forth in Appendix A reveal in graphic terms the fundamental fact which local political candidates, commercial advertisers and interest groups must invariably confront—it costs literally thousands of dollars, and often tens of thousands of dollars, more to secure comparable exposure through the principal mass media alternatives to outdoor advertising. Thus, as Table I of Appendix A demonstrates, in Denver, where a typical outdoor advertising "buy" would cost $5,100, comparable audience exposure or GRPs through radio would cost $33,462. In Waco, Texas, a much smaller market, it would cost $4,767 to achieve through newspaper advertisements the same scope of exposure yielded by an expenditure of $600 for outdoor advertising. In Birmingham, achieving a comparable level of audience exposure in newspapers, radio, and spot TV, would cost, respectively, 3.53, 3.81, and 6.88 times the cost of outdoor advertising. Similar results are obtained in the other cities reviewed in Appendix A.[3]

The implications of this cost data are obvious. For any advertiser, but especially those with limited resources and those seeking the broadest dissemination of their message, outdoor advertising is singularly cost effective. In response to the complete elimination of this medium, some well-financed advertisers who use outdoor advertising might simply increase expendi-

[3] Figures for direct mail advertising are not readily compared with those for other mass media, because of the particularly targeted audiences for which direct mail is used. By any measure, however, direct mail is vastly more expensive than outdoor advertising. Expressed simply in terms of cost per rating point, for example, direct mail is roughly 9 times more expensive than outdoor advertising in Birmingham, and roughly 6.8 times more expensive in Minneapolis.

tures in other media in order to maintain exposure levels. But for many, such a prohibition extinguishes their principle, or only means of reaching the public effectively. Their options are foreclosed.

II. Outdoor Advertising Is A Major Medium of Communications Which Expands the Opportunities for Expression Because of Its Unique Characteristics.

Billboards have been a primary means of communication in the United States since the country's inception. *See, e.g.,* P. Davidson, *Propaganda and the American Revolution,* 217-23 (1941); Gallo, *The Poster in History* (1972). Outdoor advertising has retained its significance because it is an integral component of mass communications. The striking cost-efficiency of outdoor advertising is undeniable. As the examples of billboards in Appendix I to the Jurisdictional Statement illustrate, the outdoor medium is particularly effective for projecting specific information and ideas susceptible of being stated in a succinct and straight-foreward form. *See also* S. Henderson & R. Landau, *Billboard Art* (1980). Obviously, outdoor advertising is not the most suitable medium for every type of message. But the particular characteristics of outdoor advertising clearly are very important to a myriad of political, commercial, and special interest advertisers who wish to communicate to the public. Because outdoor advertising uniquely meets their specific communications requirements, often exclusively so, billboards remain a significant medium that has become an entrenched part of the fabric of communications.

This Court has noted with respect to door-to-door canvassing that its "widespread use" attests to the

fact that it is "one of the most accepted techniques of seeking popular support." *Martin* v. *City of Struthers,* 319 U.S. 141, 145-46 (1943). Likewise, the Court has moved decisively to preserve the use of sound trucks because "[i]t is the way people are reached." *Saia* v. *New York,* 334 U.S. 558, 561 (1948). Outdoor advertising is more than a way people are reached. It is the least expensive of the mass media. It is an elemental and traditional means of communication which has retained its significance because it is cost-efficient and unique. The complete prohibition of outdoor advertising from even commercial and industrial areas under the guise of police power regulation, inevitably diminishes the opportunity for protected expression and is therefore wholly inconsistent with the purposes of the First Amendment.

CONCLUSION

For the reasons stated above, the decision of the Supreme Court of California should be reversed.

Respectfully submitted,

ERIC M. RUBIN
Counsel of Record
JEFFREY S. SALTZ
WOLF, BLOCK, SCHORR AND SOLIS-COHEN
1100 Connecticut Avenue, Suite 920
Washington, D.C. 20036
(202) 861-0870

Attorneys for the Outdoor Advertising Association of America, Amicus Curiae

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APPENDIX

APPENDIX A

TABLE I*

Cost of Achieving Comparable Audience Exposure Through Principal Local Media

	Outdoor	Newspaper	Radio	Spot TV
Denver, CO				
Audience Size (GRPs)	813	810	811	805
Cost	$5,100	$17,095	$33,462	$65,599
Cost as Percentage of Outdoor Cost	—	335%	656%	1,286%
Birmingham, AL				
Audience Size (GRPs)	503	511	498	495
Cost	$2,450	$8,648	$9,331	$16,870
Cost as Percentage of Outdoor Cost	—	353%	381%	688%
Waco, TX				
Audience Size (GRPs)	669	673	666	666
Cost	$600	$4,767	$2,754	$10,392
Cost as Percentage of Outdoor Cost	—	795%	459%	1,732%
Chicago, IL				
Audience Size (GRPs)	615	591	609	595
Cost	$23,732	$69,465	$71,400	$193,343
Cost as Percentage of Outdoor Cost	—	293%	301%	815%
Minneapolis, MN				
Audience Size (GRPs)	661	663	658	662
Cost	$10,575	$32,103	$28,608	$114,135
Cost as Percentage of Outdoor Cost	—	304%	271%	1,079%
Rochester, NY				
Audience Size (GRPs)	694	694	697	690
Cost	$2,850	$19,912	$13,680	$31,248
Cost as Percentage of Outdoor Cost	—	699%	480%	1,096%

* See page 3a *infra* for Note on Methodology and Sources.

TABLE II

Audience Exposure Achieved Through Comparable Expenditures in Principal Local Media

	Outdoor	Newspaper	Radio	Spot TV
Denver, CO				
Cost	$5,100	$4,980	$5,148	$5,034
Audience Size (GRPs)	813	235	125	70
GRPs as Percentage of Outdoor GRPs	—	29%	15%	9%
Birmingham, AL				
Cost	$2,450	$2,425	$2,604	$2,470
Audience Size (GRPs)	503	94	139	70
GRPs as Percentage of Outdoor GRPs	—	19%	28%	14%
Waco, TX				
Cost	$600	$686	$612	$636
Audience Size (GRPs)	669	64	148	40
GRPs as Percentage of Outdoor GRPs	—	10%	22%	6%
Chicago, IL				
Cost	$23,732	$23,520	$23,800	$23,223
Audience Size (GRPs)	615	186	203	73
GRPs as Percentage of Outdoor GRPs	—	30%	33%	12%
Minneapolis, MN				
Cost	$10,575	$10,701	$10,568	$10,625
Audience Size (GRPs)	661	220	243	62
GRPs as Percentage of Outdoor GRPs	—	33%	37%	9%
Rochester, NY				
Cost	$2,850	$3,004	$2,854	$2,912
Audience Size (GRPs)	694	97	147	64
GRPs as Percentage of Outdoor GRPs	—	14%	21%	9%

NOTE ON METHODOLOGY AND SOURCES

Audience size is measured in monthly gross rating points (GRPs) for adults aged 18-49, the standard measure of audience exposure in the advertising industry. Monthly GRPs represent the number of exposures during a month to an advertising message within a particular demographic group, expressed as a percentage of the population of that demographic group. For example, to say that an expenditure of $33,462 on radio advertising in Denver will yield 811 GRPs in a month among young adults aged 18-49 means that over the course of the month the number of exposures to the radio message among young adults in Denver will equal 811% of the young adult population in Denver. That is, on the average, every young adult will be exposed to the message 8.11 times per month.

The GRP measure encompasses two factors—"reach" and "frequency." "Reach" is the percentage of young adults who are exposed to an advertising message at least once during a month. "Frequency" is the average number of times that a young adult among the "reach" group is exposed to the advertising message during the month. GRP is the product of reach times frequency.

Table I is constructed for each city by beginning with the monthly cost and audience size (in terms of GRPs for adults aged 18-49) for a standard "#25 GRP showing" in outdoor advertising. (A #25 GRP showing is one which achieves 25 *daily* GRPs among the entire population.) Actual advertising "buys" in newspapers, radio, and "spot" (local) TV were then scanned to find the advertising "buy" for each medium that achieves a comparable GRP level. Table I shows the cost of the advertising "buy" in each medium that achieves a comparable GRP level. The final line for each city in Table I shows the costs of each medium as a percentage of the cost of outdoor advertising. Thus, the cost of a spot TV "buy" in Minne-

apolis that achieves 661 monthly GRPs is 662% of (6.62 times) the cost of the outdoor "buy" that achieves the same GRP level.

Table II is constructed for each city by again beginning with the monthly cost and audience size for the standard "#25 GRP showing" in outdoor advertising. Actual advertising "buys" in newspapers, on radio and spot TV were again scanned, to find the advertising "buy" for each medium that can be secured through a comparable cost expenditure. Table II shows the GRP level that is achieved in each medium through an equivalent expenditure.

The monthly advertising "buys" for each medium in each sample city are as follows:

DENVER

Outdoor — 12′ x 25′ poster panels

Selection: 1 #25 GRP showing, consisting of 21 boards.

Sources: Reach/frequency: AMMO.*
Costs: Eller Outdoor Rate Card, 1980-1981.

Radio — 30-second spots

Selection: Top 5 stations for Adults 18-49 in Drive Time.

		TABLE I		TABLE II	
Station	Cost per Spot	No. of Spots	Cost	No. of Spots	Cost
KHOW-AM	$160	12	$1,920	78	$12,480
KIMN-AM	90	12	1,080	78	7,020
KBPI-FM	60	12	720	78	4,680
KLZ-AM	78	12	936	78	6,084
KPPL-FM	41	12	492	78	3,198
TOTAL		60	$5,148	390	$33,462

Sources: Ratings: *Arbitron,* April-May 1980 (based on Average Quarter Hour).
Costs: Direct inquiries to individual stations.

* AMMO is "Audience Market by Market for Outdoor," a computer data service prepared by the Institute for Outdoor Advertising.

Television — 30-second local spots

Selection:

Daypart	Cost per Spot	Rating Adults 18-49	TABLE I No. of Spots	TABLE I Cost	TABLE II No. of Spots	TABLE II Cost
Early Fringe	$ 297	5.20	4	$1,188	31	$ 9,207
Late Fringe	382	8.65	3	1,146	31	11,842
Prime	1,350	11.41	2	2,700	33	44,550
TOTAL			9	$5,034	95	$65,599

Source: Ratings and Costs: *Media Market Guide,* 4th Qtr., 1980 (station averages).

Newspaper — ¼ page insertions

Selection:

Paper	Circulation	Audience Adults 18-49	Cost per Insert	TABLE I No. of Inserts	TABLE I Cost	TABLE II No. of Inserts	TABLE II Cost
Rocky Mt. News	222,330	312,751	495	3	$1,485	11	$ 5,445
Post	218,809	307,717	1,165	3	3,495	10	11,650
TOTAL				6	$4,980	21	$17,095

Sources: Circulation: *Circulation,* 1980-1981
Audience, Adults 18-49: *Arbitron,* April-May 1980
Costs: *Media Market Guide,* 4th Qtr., 1980 (open line rate for ¼ page ads)

BIRMINGHAM

Outdoor — 12′ x 25′ poster panels

Selection: 1 #25 GRP showing, consisting of 14 boards.

Sources: Reach/frequency: AMMO.
Costs: *Buyers Guide to Outdoor Advertising*, 1980-1981 (1981 rates).

Radio — 30-second spots

Selection: Top 5 stations for Adults 18-49 in Drive Time.

		TABLE I		TABLE II	
Station	Cost per Spot	No. of Spots	Cost	No. of Spots	Cost
WSGN-AM	$60	12	$ 720	43	$2,580
WENN-FM	44	12	528	43	1,892
WKXX-FM / WERC-AM	85 (combo)	12 / 12	1,020	43 / 43	3,655
WZZK-FM	28	12	336	43	1,204
TOTAL	217	60	$2,604	215	$9,331

Sources: Ratings: *Arbitron*, April-May 1980 (based on Average Quarter Hour).
Costs: Direct inquiries to individual stations.

Television — 30-second local spots

Selection:

			TABLE I		TABLE II	
Daypart	Cost per Spot	Rating Adults 18-49	No. of Spots	Cost	No. of Spots	Cost
Early Fringe	$235	5.09	2	$ 470	17	$ 3,995
Late Fringe	175	10.39	2	350	17	2,975
Prime	550	12.90	3	1,650	18	9,900
TOTAL			7	$2,470	52	$16,870

Source: Ratings and Costs: *Media Market Guide*, 4th Qtr., 1980 (station averages).

Newspaper — ¼ page insertions

Selection:

Paper	Circulation	Audience Adults 18-49	Cost per Insert	TABLE I No. of Inserts	TABLE I Cost	TABLE II No. of Inserts	TABLE II Cost
POST HERALD	44,780	55,854	$ 672	2	$1,344	—	—
NEWS	144,183	179,839	901	—	—	—	—
Combo*			1,081	1(2)	1,081	8(16)	$8,648
TOTAL				4	$2,425	16	$8,648

Sources: Circulation: *Circulation,* 1980-181.
Audience, Adults 18-49: *Arbitron,* April-May 1980.
Costs: *Media Market Guide,* 4th Qtr., 1980 (open line rate for ¼ page ads).

*"Combo" represents a special rate for an insertion in both newspapers. Thus, 1 combo buy represents 2 insertions, and 8 combo buys represent 16 insertions.

WACO

Outdoor — 12' x 25' poster panels

Selection: 1 #25 GRP showing, consisting of 4 boards.
Sources: Reach/frequency: AMMO.
Costs: Allen Outdoor Advertising, 1981 rates.

Radio — 30-second spots

Selection: Top 5 stations for Adults 18-49 in Drive Time.

Station	Cost per Spot	TABLE I No. of Spots	TABLE I Cost	TABLE II No. of Spots	TABLE II Cost
WACO-AM	$ 6	12	$ 72	54	$ 324
KNFO-FM	12	12	144	54	648
KRZI-AM	8	12	96	54	432
WBAP-AM	10	12	120	54	540
KHOO-FM	15	12	180	54	810
TOTAL		60	$612	270	$2,754

Sources: Ratings: *Arbitron,* April-May 1980 (based on Average Quarter Hour).
Costs: Direct inquiries to individual stations.

Television — 30-second local spots

Selection:

Daypart	Cost per Spot	Rating Adults 18-49	TABLE I No. of Spots	TABLE I Cost	TABLE II No. of Spots	TABLE II Cost
Early Fringe	$135	4.8	0	0	0	0
Late Fringe	108	6.7	2	$216	34	$ 3,672
Prime	210	13.7	2	420	32	6,720
TOTAL			4	$636	66	$10,392

Source: Ratings and Costs: *Media Market Guide,* 4th Qtr., 1980 (station averages).

Newspaper — ¼ page insertions

Selection:

Paper	Circulation	Audience Adults 18-49	Cost per Insert	TABLE I No. of Inserts	TABLE I Cost	TABLE II No. of Inserts	TABLE II Cost
TRIBUNE HERALD (Morning)	24,401	29,281	$454	1	$454	11	$4,767
TRIBUNE HERALD (Evening)	13,270	15,924		1		10	
TEMPLE TELEGRAPH	398	478	232	1	232	0	—
TOTAL				3	$686	21	$4,767

Sources: Circulation: *Circulation,* 1980-1981.
Audience, Adults 18-49: *Arbitron,* April-May 1980.
Costs: *Media Market Guide,* 4th Qtr., 1980 (open line rate for ¼ page ads).

CHICAGO

Outdoor — 12′ x 25′ poster panels

Selection: 1 #25 GRP showing, consisting of 82 boards.

Sources: Reach/frequency: AMMO
Costs: Foster & Kleiser, 1981 rates.

Radio — 30-second spots

Selection: Top 5 stations for Adults 18-49 in Drive Time.

		TABLE I		TABLE II	
Station	Cost per Spot	No. of Spots	Cost	No. of Spots	Cost
WGN-AM	$222	28	$ 6,216	84	$18,648
WLS-AM	232	28	6,496	84	19,488
WLUP-FM	130	28	3,640	84	10,920
WMAQ-AM	140	28	3,920	84	11,760
WFYR-FM	126	28	3,528	84	10,584
TOTAL		140	$23,800	420	$71,400

Sources: Ratings: *Arbitron,* April-May 1980 (based on Average Quarter Hour).
Costs: Direct inquiries to individual stations.

Television — 30-second local spots

Selection:

			TABLE I		TABLE II	
Daypart	Cost per Spot	Rating Adults 18-49	No. of Spots	Cost	No. of Spots	Cost
Early Fringe	$ 715	3.36	5	$ 3,575	29	$ 20,735
Late Fringe	1,792	5.13	4	7,168	29	51,968
Prime	4,160	12.01	3	12,480	29	120,640
TOTAL			12	$23,223	87	$193,343

Source: Ratings and Costs: *Media Market Guide,* 4th Qtr., 1980 (station averages).

Newspaper — ¼ page insertions

Paper	Circulation	Audience Adults 18-49	Cost per Insert	TABLE I No. of Inserts	TABLE I Cost	TABLE II No. of Inserts	TABLE II Cost
SUN TIMES	646,565	941,915	$1,740	3	$ 5,220	11	$19,140
TRIBUNE	660,952	962,875	4,575	4	18,300	11	50,325
TOTAL				7	$23,520	22	$69,465

Sources: Circulation: *Circulation,* 1980-1981.
Audience, Adults 18-49: *Arbitron,* April-May 1980.
Costs: *Media Market Guide,* 4th Qtr., 1980 (open line rate for ¼ page ads).

MINNEAPOLIS

Outdoor — 12′ x 25′ poster panels

Selection: 1 #25 GRP showing, consisting of 45 boards.

Sources: Reach/frequency: AMMO
Costs: Naegele Outdoor, 1981 rates.

Radio — 30-second spots

Selection: Top 5 stations for Adults 18-49 in Drive Time.

Station	Cost per Spot	TABLE I No. of Spots	TABLE I Cost	TABLE II No. of Spots	TABLE II Cost
WCCO-AM	$160	23	$ 3,680	64	$10,240
KSTP-FM	103	24	2,472	64	6,592
WDGY-AM	92	24	2,208	64	5,888
KQRS-AM	92	24	2,208	64	5,888
KQRS-FM		24		64	
TOTAL		119	$10,568	320	$28,608

Sources: Ratings: *Arbitron,* April-May 1980.
Costs: Direct inquiries to individual stations.

Television — 30-second local spots

Selection:

Daypart	Cost per Spot	Rating Adults 18-49	TABLE I No. of Spots	TABLE I Cost	TABLE II No. of Spots	TABLE II Cost
Early Fringe	$ 385	3.2	1	$ 385	11	$ 4,235
Late Fringe	685	5.5	4	2,740	40	27,400
Prime	1,500	7.4	5	7,500	55	82,500
TOTAL			10	$10,625	106	$114,135

Source: Ratings and Costs: *Media Market Guide,* 4th Qtr., 1980 (station averages).

Newspaper — ¼ page insertions

Selection:

Paper	Circulation	Audience Adults 18-49	Cost per Combo Insert	TABLE I No. of Inserts	TABLE I Cost	TABLE II No. of Inserts	TABLE II Cost
TRIBUNE	142,506	204,242	$2,253	3	$ 6,759	9	$20,277
STAR	202,927	290,839		3		9	
PIONEER PRESS	71,676	102,727	1,314	3	3,942	9	11,826
DISPATCH	116,498	166,967		3		9	
TOTAL				12	$10,701	36	$32,103

Sources: Circulation: *Circulation,* 1980-1981.
Audience, Adults 18-49: *Arbitron,* April-May 1980.
Costs: *Media Market Guide,* 4th Qtr., 1980 (open line rate for ¼ page ads).

ROCHESTER

Outdoor — 12′ x 25′ poster panels

Selection: 1 #25 GRP showing, consisting of 15 boards.

Sources: Reach/frequency: AMMO
Costs: Rochester Outdoor Advertising Co. (1981 rates).

Radio — 30-second spots

Selection: Top 5 stations for Adults 18-49 in Drive Time.

		TABLE I		TABLE II	
Station	Cost per Spot	No. of Spots	Cost	No. of Spots	Cost
WHAM-AM	$ 55	12	$ 660	60	$ 3,300
WBBF-AM	35	13	455	60	2,100
WVOR-FM	48	13	624	60	2,880
WMJQ-FM	35	13	455	60	2,100
WHFM-FM	55	12	660	60	3,300
TOTAL		63	$2,854	300	$13,680

Sources: Ratings: *Arbitron,* April-May 1980 (based on Average Quarter Hour).
Costs: Direct inquiries to individual stations.

Television — 30-second local spots

Selection:

			TABLE I		TABLE II	
Daypart	Cost per Spot	Rating Adults 18-49	No. of Spots	Cost	No. of Spots	Cost
Early Fringe	$168	4.5	4	$ 672	46	$ 7,728
Late Fringe	168	2.9	0	—	—	—
Prime	560	11.5	4	2,240	42	23,520
TOTAL			8	$2,912	88	$31,248

Source: Ratings and Costs: *Media Market Guide,* 4th Qtr., 1980 (station averages).

Newspaper — ¼ page insertions

Selection:

Paper	Circulation	Audience Adults 18-49	Cost per Insert	TABLE I No. of Inserts	TABLE I Cost	TABLE II No. of Inserts	TABLE II Cost
DEMOCRAT & CHRONICLE	119,112	151,272	$1,418	—	—	1	$ 1,418
(daily)	122,067	155,025	1,418	1	$1,418	0	—
TIMES-UNION Combination	—	—	2,025	—	—	6(12)	12,150
DEMOCRAT & CHRONICLE (Sunday)	218,120	277,012	1,586	1	1,586	4	6,344
				2	$3,004	17	$19,912

Sources: Circulation: *Circulation*, 1980-1981.
Audience, Adults 18-49: *Arbitron*, April-May 1980.
Costs: *Media Market Guide*, 4th Qtr., 1980 (open line rate for ¼ page ads).

APPENDIX B

Membership Of The Outdoor Advertising Association Of America, Inc.

ABC Outdoor Advertising, Inc.
Pewaukee, WI

Ackerley Communications, Inc.
Seattle, WA

Acme Poster Advertising Co.
Natchitoches, LA

Action Outdoor Advertising
Bryan, TX

Adams Outdoor Advertising, Inc.
Yadkinville, NC

Alabama Outdoor Advertising Co.
Birmingham, AL

Allegheny Poster Advertising Co.
Terra Alta, WV

Allen Outdoor Advertising
Waco, TX

Allison Outdoor Advertising
Sylva, NC

Americus Poster Advertising Co.
Waynesboro, GA

Appalachian Poster Adv. Co., Inc.
Lenior, NC

Austin Poster Advertising Co.
Effingham, IL

B & B Outdoor Advertising
Shreveport, LA

Barrett Outdoor Communications
Milford, CT

Bay Poster Advertising Co.
Ashland, WI

Big Tex Outdoor Advertising, Inc.,
Brownwood, TX

Blocher Outdoor Adv. Co., Inc.
St. Cloud, MN

Bocook Outdoor Media, Inc.
Anderson, SC

Burkhart Advertising, Inc.
South Bend, IN

Buts Outdoor
Fond Du Lac, WI

C & U Poster Advertising Co.
Champaign, IL

Maurice Callahan & Sons
Pittsfield, MA

Cannon Advertising Co.
Murfreesboro, TN

PREVIOUS PAGE WAS BLANK

Carlson Outdoor Advertising
Rock Island, IL

Carolina Displays, Inc.
Raleigh, NC

Central Advertising Co.
Lansing, MI

Central Georgia Advertising Co.
Waynesboro, GA

Charleston Advertising Co., Inc.
Charleston, SC

Colony Advertising, Inc.
Richmond, VA

Columbia Outdoor Advertising, Inc.
Columbia, SC

The Columbus Outdoor Adv. Co.
Columbus, OH

Crawford Advertising of Mississippi, Inc.
Gulfport, MS

Creative Displays, Inc.
Tuscaloosa, AL

Creel Outdoor Advertising
Florence, SC

Cunningham Advertising, Inc.
St. Bonifacius, MN

W.L. Denny Outdoor Advertising
Columbus, OH

Derby Outdoor Advertising
Rapid City, SD

The Derse Company
Milwaukee, WI

Dingeman Advertising, Inc.
Traverse City, MI

Display, Inc.
Waterloo, IA

Display Media
Baraboo, WI

John Donnelly & Sons
South Portland, ME

Donrey Outdoor Advertising Co.
Fort Smith, AK

Dowie Outdoor, Inc.
Cedar Rapids, IA

Duplex Advertising Co.
Austin, TX

Estus Outdoor Advertising Co.
Savannah, GA

Fabian Advertising, Inc.
Herman, MN

Fendig Outdoor Advertising Co.
St. Simons Island, GA

Flynn Outdoor Advertising
Sioux City, IA

Flynn Outdoor Advertising
Sioux Falls, SD

Flynn Outdoor Advertising
Sheboygan, WI

Foster and Kleiser
Los Angeles, CA

Finney Outdoor Advertising Corp.
Fall River, MA

French Advertising
Fond Du Lac, WI

Gannett Outdoor Advertising Group
Phoenix, AZ

Georgia Outdoor Advertising, Inc.
Athens, GA

Ghaster Outdoor Advertising, Inc.
Lima, OH

Giddings Outdoor Advertising Service
Carrollton, KY

Green Bay Poster Advertising
Green Bay, WI

Griese Companies, Inc.
New Canaan, CT

H & V Advertising Co.
Rusk, TX

Hale Poster Advertising Co.
Iron Mountain, MI

Hansen Advertising Company, Inc.
Madison, WI

Frank Hardie Advertising, Inc.
Dubuque, IA

Harris Poster Advertising Co.
Griffin, GA

The Hathaway Advertising Co.
New Bedford, MA

Hausen Poster Advertising Co.
Fort Atkinson, WI

Hemmert Outdoor Advertising Co.
Sidney, OH

Heywood Company Outdoor Adv. of California
San Bernadino, CA

Holland Advertising Co.
Beaumont, TX

Hoosier Outdoor Advertising Corp.
Bloomington, IN

Illinois Poster Advertising Co.
Sterling, IL

Imperial Outdoor Advertising, Inc.
Lincoln, NE

Jackson Outdoor Advertising, Inc.
Michigan City, IN

Jackson Poster Advertising System
Charlottesville, VA

Johnstown Poster Advertising Co.
Johnstown, PA

Kanawha Valley Advertising Co.
Charleston, WV

Keleher Outdoor Advertising
Bartlesville, OK

Kenosha Advertising Co.
Kenosha, WI

Key Outdoor, Inc.
Kankakee, IL

Krain Outdoor Advertising
Cheltenham, PA

The Lamar Corporation
Baton Rouge, LA

Lamar Outdoor Advertising, Inc.
Jackson, MS

Jules Lauve, Jr., Inc.
Galveston, TX

Louisiana Sign Company, Inc.
Sulphur, LA

M & C Company
Eagle Grove, IA

McWhorter Advertising Corp.
Bridgeport, WV

Major Media, Inc.
Eden Prairie, MN

Marden Advertising Co.
Duncan, OK

Martin Communications, Inc.
Los Angeles, CA

Mathey-Strong, Inc. Outdoor Advertising
Peoria, IL

The R.C. Maxwell Company
Trenton, NJ

Miller Outdoor Advertising, Inc.
Laurens, SC

Missouri Valley Poster Advertising Co.
Falls City, NE

Modjeska Sign Studios, Inc.
Kingston, NY

Morgan Signs, Inc.
State College, PA

Moynihan Outdoor Advertising, Inc.
Princeton, IL

Murphy Advertising Co.
Waterbury, CT

Murphy Incorporated
Bridgeport, CT

Myhre Advertising
Great Falls, MT

Naegele Outdoor Advertising Co. of the Twin Cities, Inc.
Minneapolis, MN

National Advertising Company
Argo, IL

Nauman Outdoor Advertising Co.
Lancaster, OH

Newman Outdoor Advertising
Jamestown, ND

Northern Illinois Outdoor Advertising Co.
Freeport, IL

Norton Outdoor Advertising, Inc.
Cincinnati, OH

Norwood Advertising Co.
Brady, TX

Ohio Outdoor Advertising Corp.
Fremont, OH

Orde Advertising Co.
Green Bay, WI

Outdoor Communications, Inc.
Corinth, MS

Outdoor Suburban
Corsicana, TX

Outdoor West, Inc.
Tri-Cities, TN

Owens Outdoor Advertising
Van Wert, OH

Ozark Poster Advertising Co.
Harrison, AK

PBM Advertising Co.
Vienna, WV

Park Outdoor Advertising
Ithaca, NY

Patrick Outdoor Media, Inc.
Dunmore (Scranton), PA

Penn York Advertising, Inc.
York, PA

Philadelphia Outdoor
Gladwyne, PA

Piedmont Outdoor Advertising Co.
Greensboro, NC

Pittsburgh Outdoor Advertising
Pittsburgh, PA

Pocono Outdoor Advertising Co.
Bangor, PA

Port Arthur Poster Advertising Co.
Port Arthur, TX

Porter Poster Service
Richmond, IN

Racine Advertising Co.
Kenosha, WI

Reading Outdoor Advertising Co.
Centralia, IL

Reagan Outdoor Advertising, Inc.
Salt Lake City, UT

Richards of Course, Inc.
Syracuse, NY

Robbinswood, Inc.
Rockford, IL

Rochester Outdoor Advertising
Rochester, NY

Rollins, Inc.
Atlanta, GA

Root Outdoor Advertising, Inc.
Toledo, OH

Sapp Outdoor Advertising Co.
Statesboro, GA

Schloss Outdoor Advertising Co.
Charlotte, NC

Schwab Advertising System, Inc.
Davenport, IA

Shaw Poster Advertising Co.
Grand Forks, ND

Silsbee Poster Advertising Co.
Port Arthur, TX

Skoglund Communications, Inc.
La Crosse, WI

Smith Advertising Co.
Petersburg, VA

Southern Ohio Outdoor Advertising Co., Inc.
Hillsboro, OH

Spomer Outdoor, Inc.
Joplin, MO

Springfield Advertising Co.
Springfield, MA

Springfield Outdoor Advertising Co.
Springfield, OH

Staff Outdoor Advertising
East Liverpool, OH

Stait Outdoor Advertising Company
Philadelphia, PA

Standard of Appleton, Inc.
Appleton, WI

Standish-Johnson Company
Providence, RI

State Outdoor Advertising, Inc.
Gary, IN

H.A. Steen Industries, Inc.
Philadelphia, PA

Stewart Poster Advertising
Clinton, IA

Jay B. Stott Outdoor Advertising
Chico, CA

Summey Sign & Outdoor Advertising Co.
Black Mountain, NC

Sunrise Outdoor Advertising, Inc.
Garden City, NY

Texas United Outdoor Advertising Co., Inc.
Fort Worth, TX

Turner Advertising Co.
Atlanta, GA

Van Wagner Advertising Corp.
Jamaica, NY

Victor Sign Corporation
Chicago, IL

Virginia Outdoor, Inc.
Lynchburg, VA

Vivid, Inc.
Janesville, WI

Vogel Outdoor Advertising
Rochester, MN

Wardlow Advertising Co.
Waynesboro, GA

Waycross Outdoor Advertising Co.
St. Simons Island, GA

Weatherby Advertising Company
Jefferson City, MO

Western Advertising System
Abilene, TX

Whiteco Metrocom
Merrillville, IN

Whitehead Outdoor
Silver Spring, MD

Whitmier & Ferris Company, Inc.
Buffalo, NY

Woodie Outdoor Advertising Co., Inc.
Bluefield, WV

Y-Knot Outdoor Advertising, Inc.
Chariton, IA

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No. 80-195

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

METROMEDIA, INC.,

Appellant,

v.

CITY OF SAN DIEGO, a municipal corporation, and DOES I through XX, inclusive,

Appellees.

PACIFIC OUTDOOR ADVERTISING CO., INC.

Appellant,

v.

THE CITY OF SAN DIEGO, a municipal corporation, THE CITY COUNCIL OF SAN DIEGO, VOYD BEIGHTS, Zoning Administrator of the City of San Diego and DOES I through X, inclusive,

Appellees.

On Appeal from the Supreme Court of California

BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

RONALD A. ZUMBRUN
THOMAS E. HOOKANO
COUNSEL OF RECORDS
Pacific Legal Foundation
455 Capitol Mall, Suite 600
Sacramento, California 95814
Telephone: (916) 444-0154

RAYMOND M. MOMBOISSE
CHRISTOPHER H. COLLINS
Pacific Legal Foundation
1990 M Street, N.W., Suite 550
Washington, D.C. 20036
Telephone: (202) 466-2686

Attorneys for Amicus Curiae Pacific Legal Foundation

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No. 80-195

IN THE

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OCTOBER TERM, 1980

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Appellees.

PACIFIC OUTDOOR ADVERTISING CO., INC.,

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THE CITY OF SAN DIEGO, a municipal corporation, THE CITY COUNCIL OF SAN DIEGO, VOYD BEIGHTS, Zoning Administrator of the City of San Diego and DOES I through X, inclusive,

Appellees.

On Appeal from the Supreme Court of California

BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule No. 36, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae

in support of appellants. Consent to the filing of this brief has been granted by counsel for both parties. Copies of these letters of consent have been lodged with the Clerk of this Court.

PLF is a nonpro t, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the broad public interest. Policy for PLF is established by an independent Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The PLF Board has authorized the filing of this brief.

This action involves the validity of San Diego Ordinance No. 10795 (New Series) (hereinafter Ordinance) which purports to ban all off-site outdoor advertising from the City of San Diego. In doing so, the Ordinance destroys a multimillion dollar business which has flourished in the city since its inception, and deprives the inhabitants of San Diego of a unique and accepted means of communicating with each other. (It is beyond dispute that the medium is utilized for other than commercial purposes.)

Amicus is especially aggrieved as a public interest organization due to the nature of the communication medium outlawed. The Ordinance precludes PLF's members, supporters, and contributors from using the billboard medium as a means both of *receiving* and *conveying* important information. In essence, the Ordinance restricts access by the public to the marketplace of ideas. The government "may not, consistently with the spirit of the First Amendment, contract the scope of available knowledge." *Griswold v. Connecticut,* 381 U.S. 479, 482 (1965).

The Ordinance does provide certain limited exceptions. For example, certain types of political messages are permitted by the use of *temporary* political campaign signs which are maintained for not longer than 90 days *and* are removed within ten days after the election to which they pertain. But this exception is so narrow that political expression outside the

context of a current campaign is banned. Expression against involvement in the United Nations, against rising taxes, or a protest related to the assassination of the Israeli delegation to the Munich Olympic Games would be totally prohibited. *See* Juris. Statement, App. I. In fact, virtually all communication would be banned from billboards in San Diego. Those few exemptions from the Ordinance allowing certain messages to be conveyed bear no rational relation to the goals of the city which are stated in the Ordinance—traffic safety and aesthetics.

The courts have historically allowed the widest latitude for discussion and the narrowest range for its restriction. *Thomas v. Collins,* 323 U.S. 516, 530 (1945). PLF is concerned that the Ordinance, which totally prohibits many messages from being displayed while permitting limited exceptions, bears no reasonable relationship to the stated goals of the city, and is overly broad and not narrowly drawn to serve the stated goals of the city. Therefore, the Ordinance violates the constitutional guarantees of free speech, equal protection, and due process.

SUMMARY OF ARGUMENT

San Diego Ordinance No. 10795 violates the guarantee of freedom of speech contained in the First Amendment to the United States Constitution, because it restricts both the right to disseminate information and the right to acquire information. The restriction imposed by the Ordinance is unconstitutional because it is content-based, prohibiting certain messages from being conveyed on billboards while allowing others to be so conveyed.

Even if it could be said that the Ordinance represents a time, place, or manner restriction, the Ordinance still violates the First Amendment. It unduly burdens constitutional rights by totally precluding opportunities for the communication of thought, in the pursuit of the goals of traffic safety and aesthetics. Additionally, the Ordinance bears no reasonable relationship to the achievement of its stated goals and is overly broad in scope and not narrowly drawn to serve the goals of the city.

By totally shutting down the use of a traditional public forum for the expression of ideas, the ban unduly burdens certain segments of society. Specifically, the ban works hardest against those who cannot afford the more expensive print and broadcast media, those who wish a limited, yet effective circulation of their message, those whose message requires the visual impact that only a billboard can provide, and those whose message can only be conveyed effectively through billboards.

The Ordinance also violates the constitutional guarantee of equal protection by permitting certain messages to be conveyed on billboards while prohibiting others from being displayed. Content-based restrictions on the exercise of free speech violate the Equal Protection Clause.

Lastly, the Ordinance violates the constitutional guarantee of due process because, under the guise of the police power, it seeks to achieve certain goals by the use of means which are arbitrary and discriminatory, and which bear no reasonable relation to the health, safety, welfare, or morals of the community.

ARGUMENT

I

THE SAN DIEGO ORDINANCE VIOLATES THE CONSTITUTIONAL GUARANTEE OF FREE SPEECH

A. Regulation of Speech Based on Content Is Unconstitutional

The First Amendment to the United States Constitution guarantees in part that "Congress shall make no law . . . abridging the freedom of speech . . . ." This is the most majestic guarantee contained in the Constitution. L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 12-1 (1978). The dissemination of opinions on matters of public interest is an "unalienable right," and is the "matrix, the indispensible condition, of nearly every other form of freedom." *Curtis Publishing Co. v. Butts,* 388 U.S.

130, 145, 149 (1967). This fundamental right has been made applicable to the states by the Fourteenth Amendment.[1] *Central Hudson Gas & Electric Corp. v. Public Service Commission,* 100 S. Ct. 2343, 2349 (1980).

The purposes of the First Amendment are stimulation of free discussion and interchange of ideas, *Buckley v. Valeo,* 424 U.S. 1, 14 (1976), protection of the "marketplace of ideas" from governmental infringement, and promotion of intelligent self-government in a democratic system, L. TRIBE, *supra,* in order that "such freedom will ultimately produce a more capable citizenry and a more perfect polity." *Cohen v. California,* 403 U.S. 15, 24 (1971). *See Consolidated Edison Co. v. Public Service Commission,* 100 S. Ct. 2326, 2331 (1980). The "freedom to think as you will and to speak as you think" is "indispensible to the discovery and spread of political truth." *Whitney v. California,* 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). The protections of the First Amendment include the right of the recipient to acquire information as well as the right of the speaker to disseminate information. *Pell v. Procunier,* 417 U.S. 817, 832 (1974); *Stanley v. Georgia,* 394 U.S. 557, 564 (1969).

The general presumption in favor of the constitutional validity of legislation is not applicable in those instances where the legislation is challenged on the ground that it restricts the preeminent freedoms secured by the First Amendment. *Erznoznick v. City of Jacksonville,* 422 U.S. 205, 215 (1976). San Diego Ordinance No. 10795 (New Series) represents such

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[1] Article I, section 2 of the California Constitution is the state equivalent of the First Amendment. The recognition by this Court last term that this provision grants broader rights of free expression than the United States Constitution, represents "a very healthy trend of affording state constitutional provisions a more expansive interpretation than this Court has given to the Federal Constitution." *Prune Yard Shopping Center v. Robins,* 100 S. Ct. 2035, 2046 (1980) (Marshall, J., concurring). In this case, the California Supreme Court, without discussion of the broader state free speech rights involved, held that the Ordinance does not abridge freedom of speech under the state constitution. *Metromedia, Inc. v. City of San Diego,* 26 Cal. 3d 848, 871, 610 P.2d 407, 420 (1980). Because, as discussed further below, the Ordinance violates the First Amendment, it necessarily follows that the Ordinance also violates the broader state constitutional rights of free expression.

a restriction. By prohibiting the posting of written political, social, religious, community-related, and commercial communications on the streets of San Diego,[2] the Ordinance constitutes a "substantial and material limitation on the physical ability of the citizens ... to effectively communicate their sentiments to one another" and thus interferes with "the ability of both the communicator and his audience to engage in a silent dialogue on the issues of the day." *Oklahoma ex rel. Department of Transportation v. Pile,* 603 P.2d 337 (Okla. 1979), *petition for cert. filed,* 48 U.S.L.W. 3699 (U.S. Feb. 11, 1980) (No. 79-1617). Communication of information, dissemination of views and ideas, and advocacy of causes are activities protected under the First Amendment. *Village of Schaumberg v. Citizens for a Better Environment,* 100 S. Ct. 826, 833-34 (1980). State laws restricting the use of property are invalid if they infringe the freedom of expression protected by the First and Fourteenth Amendments. *Prune Yard Shopping Center v. Robins,* 100 S. Ct. at 2049 (1980) (Powell, J., concurring).

Of course, the Ordinance is not *ipso facto* invalid merely because it limits the ability to express one's self. This Court has recognized that in certain instances, this right may be curtailed. *E.g., Gertz v. Welch,* 418 U.S. 323 (1974) (defamation); *Roth v. United States,* 354 U.S. 476 (1957) (obscenity); *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942) (fighting words);

---

[2] The California Supreme Court's discussion of the First Amendment issue in this case presupposes that the city's ban affects only commercial speech. It is well settled that commercial speech is entitled to First Amendment protection. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n,* 100 S. Ct. 2343, 2349 (1980). As Mr. Justice Brennan stated in his concurrence in that case, "[n]o differences between commercial speech and other protected speech justify suppression of commercial speech in order to influence public conduct through manipulation of the availability of information." *Id.* at 2354. However, it must be noted here that the Ordinance bans more than just commercial speech, which has been defined as business advertising that does no more than solicit a commercial transaction or state information relevant thereto. Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment,* 65 Va. L. Rev. 1, 1 (1979). Billboards carrying political, social, religious, and community service messages serve the same functions as newspapers and cannot be classified as commercial speech. *See* Juris. Statement, App. I.

Schenck v. United States, 249 U.S. 47 (1919) ("clear and present danger"). However, the governmental body seeking to prohibit the expressive activity must demonstrate that the regulation is constitutionally permissible. *Consolidated Edison*, 100 S. Ct. at 2322. This is a burden that the City of San Diego cannot meet.

The San Diego Ordinance bans the use of billboards for the display of many types of messages in the city. Such signs are both "a means of communication and a media for the expression of ideas," Joint Stipulation of Facts, Juris. Statement at 122a; and are used to advertise political, social, religious, community affairs, and commercial messages. *Id.* at 124a-126a. Exhibit A of the brief amicus curiae of Pacific Legal Foundation before the California Supreme Court, substantially reprinted in the Jurisdictional Statement at Appendix I, illustrates the types of uses to which billboards are put in San Diego.

The Ordinance *does* permit certain other messages to be displayed on signs in the city. These exceptions highlight the fact that the Ordinance impermissibly attempts to regulate speech on the basis of content. The Ordinance does not prohibit on-site signs. Nor does the Ordinance apply to billboards which designate premises for sale, lease, or rent; billboards depicting time, temperature, or news; temporary billboards related to political campaigns; religious symbols; or commemorative plaques of historical societies. Clearly, then, the Ordinance is aimed at the content of the message, by proscribing certain subject matter from billboards, while permitting other messages to be displayed. The Ordinance does not attempt to regulate the time, place, or manner of all messages sought to be conveyed, but instead expressly distinguishes between permissible and impermissible messages on the basis of their substantive content. Such content-based regulation is unconstitutional. *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972).

The proper test to determine the validity of a regulation which restricts the time, place, or manner of protected speech, rather than the content of the speech, is to balance the

competing interests involved by weighing the extent to which the communicative activity is inhibited versus the interest served by enforcing the inhibition. *See Grayned v. City of Rockford,* 408 U.S. 104, 115 (1972). On the other hand, as in this case, when the regulation abridges protected speech on the basis of *content,* such regulations *must* be struck down under the First Amendment; no balancing of governmental interest is permissible since no valid reason may be given for content-based abridgement of speech:

> "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. [Citations omitted.] To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' New York Times Co. v. Sullivan, *supra,* 376 U.S., at 270, 84 S.Ct., at 721." *Mosley,* 408 U.S. at 95-96.

Accord, Hudgens v. National Labor Relations Board, 424 U.S. 507, 520-21 (1976). *See also Cohen v. California,* 403 U.S. at 19.

Because the San Diego Ordinance impermissibly bans certain messages while allowing others, it conflicts with the well-established laws of our nation enjoining content-based prohibitions on the free exercise of speech. As such, the law is constitutionally infirm.

B. The Undue Burden on Free Speech Is Not Related to the Goals of the Ordinance

Even if this Court views the Ordinance as a regulation of time, place, or manner, which adversely affects free speech,

rather than one aimed at the content of the protected expression, the Ordinance suffers the same constitutional infirmity. Such a restriction on free speech must be evaluated to determine whether it "is exerted so as not to *deny or unwarrantedly abridge* ... opportunities for the communication of thought." *Cox v. New Hampshire,* 312 U.S. 569, 574 (1941) (emphasis added). *See Village of Schaumberg,* 100 S. Ct. at 834. To achieve this, a "balancing test" has traditionally been employed. The factors to be balanced are, on the one hand, "the extent to which communicative activity is in fact inhibited; and on the other hand, the values, interests or rights served by enforcing the inhibition." L. TRIBE, *supra* at § 12-20. The restriction must be no greater than necessary to achieve the stated governmental interest. *United States v. O'Brien,* 391 U.S. 367, 377 (1968). *See* Bogen, *Balancing Freedom of Speech,* 38 Md. L. Rev. 387 (1979).

Two variables are examined in the weighing process. The first is the degree to which the regulation falls unevenly upon various groups in society. The second is the degree to which the regulation shuts down otherwise traditional public forums. L. TRIBE, *supra.* Such time, place, and manner restrictions cannot be applied, however, to prohibit the use of a legitimate forum, *Hague v. CIO,* 307 U.S. 496, 516 (1939), or to force the speaker to move from one appropriate place to another. *Spence v. Washington,* 418 U.S. 405, 411n.4 (1974). *See Schneider v. New Jersey,* 308 U.S. 147 (1939). In this case, the prohibition on free expression imposed by the Ordinance must be balanced against the stated goals of promoting aesthetics and vehicle safety. *See Oklahoma ex rel. Department of Transportation v. Pile, supra.*

The first factor to be examined in the "balancing test" is the extent to which the Ordinance inhibits communicative activity. The Ordinance prohibits the use of a recognized public forum for the exercise of First Amendment rights. *Schneider, supra; Hague, supra.* By forbidding certain messages to be conveyed on billboards, the Ordinance disproportionately impacts those who cannot afford to utilize the more expensive media of radio, television, and newspapers, and thereby denies

equal opportunities for the communication of thought. Billboards are the least expensive of the mass media, Juris. Statement at 18n, and in many instances are the only available public medium for those who wish to widely disseminate their message, but who lack the wherewithal to gain access to the press or the airwaves.

Because the message is conveyed free to the public, billboards have a greater potential for reaching a greater number of people in a given area than the press. The cost to the consumer of obtaining information through the print media serves to narrow the receiving audience. For many people, access to the public through radio or television is economically prohibitive. Unlike the costs of commercial speech, which are likely to be passed on to the consumer of the good or the product, "increasing the costs of communication for noncommercial speech may totally silence it." *Bogen,* 38 Md. L. Rev. at 412. *See Linmark Associates, Inc. v. Township of Willingboro,* 431 U.S. 85, 93 (1977); *Martin v. Struthers,* 319 U.S. 141, 146 (1943). "The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion." *Buckley v. Valeo,* 424 U.S. at 49. The availability of alternate public forums is an impermissible criterion in this analysis. *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974).

Billboards are also a valued forum for the exercise of free expression because, in many instances, they are the most suitable alternative for conveying the desired message. In short, they are a unique medium of communication for which no adequate substitute exists. *See Linmark Associates,* 431 U.S. at 93. Billboards permit visual impact not substantially reproducible in any other medium. This is a vital feature with respect to communication for which the visual image is an integral part. Billboards permit the projection of a "larger than life" image unequaled by any other medium. The impact of a billboard message protesting higher taxes or government regulation or warning of the need for energy conservation is unparalleled by any other means. *See* Juris. Statement, App. I.

Additionally, there are some messages which can be communicated effectively *only* through billboards; for example, the fast food restaurant, motel, or gas station which wishes to indicate its location ("two blocks east of the next freeway exit") to the out-of-town or highway traveler. Finally, the use of billboards allows messages to be directed to only a narrow segment of the general community, for example, by appealing to certain ethnic groups, or by advertising neighborhood community or social programs. Billboards are a much more effective medium for restricting the message to its area of greatest effectiveness than the other standard media which cannot readily be limited to a particular area or neighborhood.

The Ordinance also has a negative impact on commercial competition. The cost impact will fall disproportionately upon smaller, less established businesses. New companies are less likely to be able to afford alternative advertising media than established ones. This is compounded by the fact that the need for product recognition is more pressing for the newcomer attempting to compete with older, more established products which the public recognizes with ease. The inability to restrict advertising to a particular market also works to the special disadvantage of the smaller, local, and/or new competitor with a restricted advertising budget. National or even statewide advertisement in magazines or on television is not only expensive, but is wasteful for a product with only local appeal. *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).

The Ordinance not only has a detrimental effect on advertisers, but also infringes on the right of the consuming public to receive the information which billboards provide, whether it be political, social, or commercial. This right to receive information is independently protected by the First Amendment. The "right to receive information and ideas, regardless of their social worth ... is fundamental to our free society." *Stanley*, 394 U.S. at 564 (citations omitted).

The competing factor to be weighed in the "balancing test" is the extent to which the values, interests, or rights of the city are served by enforcing the prohibition. The above interests

served by the use of billboards for the free exercise of First Amendment rights must be balanced against the furtherance of the city's substantial governmental interest. *United States v. O'Brien,* 391 U.S. at 377. The stated goals of the Ordinance are to eliminate traffic hazards caused by distracting signs, and to preserve and improve the appearance of the city.[3] However, when, as here, "it is shown that a governmental action threatens significantly to impinge upon constitutionally protected freedom it becomes the duty of this court to determine whether the action bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification." *Bates v. City of Little Rock,* 361 U.S. 516, 525 (1960). This Court must also determine whether the action sweeps unnecessarily broad, thereby invading an area of protected freedoms. *Griswold v. Connecticut,* 381 U.S. at 485.

The Ordinance was enacted to eliminate traffic hazards caused by signs. The California Supreme Court held, without any specific findings, that such a reasonable relation exists, because billboards divert the attention of drivers from the roadway. *Metromedia,* 610 P.2d at 412. In fact, the record in this case shows that the opposite is true. Juris. Statement at 25-26. The court was also forced to reverse its own previous holding to reach the conclusion that aesthetics alone are sufficient to ban billboards. *Id.* at 413. However, the Ordinance does not limit itself to only those signs which impede a clear view of the roadway, or those signs within a certain distance of the roadway. Nor does the Ordinance include within its prohibition on-site signs; religious and historical society emblems; sale, lease, or rent signs; signs on trucks, buses, and taxicabs; temporary political campaign signs; or signs depicting time, temperature, or news, which, in most instances, depend on the use of flashing lights to convey their messages. These signs can be of equal or greater distraction than, and have the same potential for aesthetic violation as, those signs prohibited by the Ordinance, yet they are not included.

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[3] The Ordinance also states as its goals the elimination of excessive confusion caused by sign displays, and the assurance that signs are used only for identification and not for advertisement.

In the pursuit of its legitimate interests, the city must employ "narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms." *Village of Schaumberg,* 100 S. Ct. at 836. *See Griswold v. Connecticut,* 381 U.S. at 485. If there is no nexus between the means used to regulate the activity and the legitimate ends of the regulation, the court may disregard the ends as justification for the challenged law. *E.g., Street v. New York,* 394 U.S. 576 (1969).

In this case, even if this Court views the Ordinance as not banning the content of the message, but rather an attempt to control the time, place, or manner of billboard use, the Ordinance must be found to be void because it sweeps unnecessarily broad, and bears no rational relation to the legal fictions put forth as the goals which it purportedly seeks to achieve. *Village of Schaumberg,* 100 S. Ct. at 836-37. For this reason, the Ordinance unconstitutionally violates the guarantee of free speech.

II

THE SAN DIEGO ORDINANCE VIOLATES THE CONSTITUTIONAL GUARANTEE OF EQUAL PROTECTION OF THE LAWS

The Fourteenth Amendment to the United States Constitution guarantees that "[n]o state shall ... deny to any person within its jurisdiction the equal protection of the laws." It has been said that to deny the use of a traditional public forum such as the streets for the dissemination of certain information, "while allowing other groups to use the streets to voice opinions on other subjects . . . amounts . . . to an invidious discrimination forbidden by the Equal Protection Clause of the Fourteenth Amendment." *Cox v. Louisiana,* 379 U.S. 536, 581 (1965) (Black, J., concurring). *See Mosley,* 408 U.S. at 96-98.

The Ordinance violates the Fourteenth Amendment guarantee of equal protection because it impermissibly accords preferential treatment to the dissemination of certain messages

on billboards in the city while totally prohibiting other messages from being so conveyed. "When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized." *Carey v. Brown*, 100 S. Ct. 2286, 2290 (1980). In *Carey*, this Court found that the labor picketing ordinance in question, enacted under the guise of preserving residential privacy, actually discriminated on the basis of content by flatly prohibiting all nonlabor picketing while permitting labor picketing that is equally likely to intrude on the tranquility of the home. *Carey*, 100 S. Ct. at 2291. Adopting the language of *Mosley*, this Court held that

> " 'under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.' " *Carey*, 100 S. Ct. at 2291, *quoting Mosley*, 408 U.S. at 95-96.

Because the restriction was content-based, this Court held that "even the most legitimate goal may not be advanced in a constitutionally impermissible manner." *Carey*, 100 S. Ct. at 2292. Rejecting the argument that protest over some issues "is more deserving of First Amendment protection than are public protests over other issues, particularly the important economic, social, and political subjects about which these appellees wish

to demonstrate," this Court found the statute to contravene the Equal Protection Clause. *Id.* at 2293.

The logic of *Carey* is directly applicable to this case. The Ordinance, as a content-based restriction, cannot be legitimized by the invocation of the allegedly laudable goals to be served. Even if such an analysis *were* permitted, there is nothing in the content-based restriction which would promote those goals. The ends of traffic safety and aesthetics are not served by a regulation which prohibits certain economic, political, and social messages on signs while allowing others to be displayed. Nor does the restriction attempt to tailor the means to achieve the ends in a less intrusive manner. The Ordinance does not attempt to control on the basis of size, shape, or location of billboards in order to promote aesthetics or traffic safety. Instead, the Ordinance discriminates on the basis of content.

The reasoning of *Carey* and *Mosley* are applicable to this case. For this reason, the Ordinance unconstitutionally violates the Equal Protection Clause.

III

THE SAN DIEGO ORDINANCE VIOLATES THE CONSTITUTIONAL GUARANTEE OF DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS

The Fifth Amendment to the United States Constitution forbids federal actions which amount to a deprivation of life, liberty, or property, without due process of law, and has been made applicable to the states by the Fourteenth Amendment. *Chicago, Burlington & Quincy Railroad Co. v. Chicago,* 166 U.S. 226 (1897). The purpose of these procedural safeguards is to insure personal freedom by preventing arbitrary government action, even in areas of legitimate government concern. L. TRIBE, *supra* at § 10-7. Various types of legislation have been held to violate due process where they have been deemed to constitute an inappropriate response to a perceived evil, resulting in an arbitrary deprivation of liberty or property of individuals. *See, e.g., Stanley v. Illinois,* 405 U.S. 645 (1972).

Governmental restrictions on the use of private property have traditionally occurred in either one of two generally recognized ways. The government may either take private property for a public purpose through the power of eminent domain, or it may regulate the use of private property through the police power. If eminent domain is used to take private property, compensation must be paid. Normally, no compensation is required when property is regulated under the police power.[4] However, the regulation must bear a rational relation to the health, safety, welfare, or morals of the community, and must not be arbitrary or discriminatory. An exercise of the police power which does not meet these requirements constitutes a denial of the constitutional right of due process. *Nebbia v. New York,* 291 U.S. 502, 537 (1934). *See Fred F. French Investment Co. v. City of New York,* 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5, *appeal dismissed,* 429 U.S. 990 (1976). "A claim that action is being taken under the police power of the state cannot justify disregard of constitutional inhibitions." *Panhandle Eastern Pipe Line Co. v. State Highway Commission,* 294 U.S. 613, 619 (1935).

The Ordinance was purportedly enacted to promote aesthetics and traffic safety. These are proper factors for consideration in the exercise of the police power. Moreover, it is clear that governmental restrictions on the use of commercial property are proper. *New Motor Vehicle Board v. Orrin W. Fox Co.,* 439 U.S. 96, 107 (1978). However, as with any exercise of the police power, it is well settled that the means employed must be reasonably related to the ends sought to be achieved, and must not sweep more broadly than is necessary to achieve the desired ends. 1 N. WILLIAMS, AMERICAN PLANNING LAW—LAW USE AND THE POLICE POWER, § 7.04 (1975).

There can be no question that the purpose of the Ordinance is to ban all billboards from the City of San Diego. It is clear that the effect of the Ordinance on the appellants, by

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[4] Compensation is of course required when an exercise of the police power, even if valid, "goes too far" and becomes a taking. *Kaiser-Aetna v. United States,* 100 S. Ct. 383 (1979); *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922).

precluding them from conducting business in the city, constitutes a deprivation of property. The question arises whether this deprivation falls within the bounds of constitutionality.

The inquiry thus focuses on whether the Ordinance relates in a reasonable way to the health, safety, welfare, or morals of the community. *Bates v. City of Little Rock,* 361 U.S. at 525. As discussed further in Section I B. of this brief, the Ordinance, which bans the free exercise of speech, is not reasonably related to aesthetics or traffic safety. Specifically, the Ordinance cannot be said to be a regulation of potentially distracting or aesthetically unpleasing signs, because it does not include within its draconian dictates all such signs. It contains certain exemptions, and even permits the display of time, temperature, and news on signs, which, in most instances, utilize flashing lights to convey their message. It is difficult to imagine any sign which would be more distracting. Moreover, the Ordinance is not limited in scope to only those signs which impede a clear view of the roadway, or which are located a certain distance from the roadway, but includes *all* signs, regardless of location.

During the autumn months, many people enjoy driving through the countryside to observe the fall foliage. Under the logic of the Ordinance, the owner of a forest located adjacent to a road would be required to clear-cut his land in order not to distract motorists. Such an interpretation is, of course, absurd. So too is the justification put forth by the City of San Diego for banning billboards. The Ordinance bears no rational relation to its stated goals, and constitutes an arbitrary and discriminatory use of the police power. As such, the Ordinance violates the constitutional guarantee of due process.

CONCLUSION

It is the position of Pacific Legal Foundation that the San Diego Ordinance violates the constitutional guarantees of free speech, equal protection, and due process. For these reasons, the decision of the California Supreme Court in this case should be reversed.

Respectfully submitted,

RONALD A. ZUMBRUN
THOMAS E. HOOKANO
COUNSEL OF RECORD
Pacific Legal Foundation
455 Capitol Mall, Suite 600
Sacramento, California 95814
Telephone: (916) 444-0154

RAYMOND M. MOMBOISSE
CHRISTOPHER H. COLLINS
Pacific Legal Foundation
1990 M Street, N.W., Suite 550
Washington, D.C. 20036
Telephone: (202) 466-2686

Attorneys for Amicus Curiae
Pacific Legal Foundation

November, 1980

JAN 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-195

METROMEDIA, INC., et al.,
Appellants,

vs.

CITY OF SAN DIEGO, et al.,
Appellees.

BRIEF IN SUPPORT OF APPELLEE FILED BY AMICUS CURIAE CITY AND COUNTY OF SAN FRANCISCO

GEORGE AGNOST
City Attorney
BURK E. DELVENTHAL
DIANE L. HERMANN
ALICE SUET YEE BARKLEY
Deputy City Attorneys
206 City Hall
San Francisco, California 94102
Telephone: (415) 558-3660

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IN THE

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OCTOBER TERM, 1980

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METROMEDIA, INC., et al.,

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Appellees.

BRIEF IN SUPPORT OF APPELLEE FILED BY AMICUS CURIAE CITY AND COUNTY OF SAN FRANCISCO

STATEMENT OF INTEREST

The City and County of San Francisco (hereinafter, "San Francisco") adopted a comprehensive sign ordinance in 1965. That ordinance prohibits off-site advertising ("general advertising") signs in all residential, neighborhood shopping, and public use districts. The ordinance also establishes certain "special sign districts"[1] and prohibits general advertising signs

[1] Among the special sign districts established by this ordinance are the following: Areas within 100 feet of residential districts where the sign is to be viewed primarily from residentially-zoned property; areas within 100 feet of certain schools; areas within 200 feet of public

(Footnote continued on following page)

in those districts. Nonconforming signs are required to be removed after specified amortization periods.

San Francisco's sign ordinance exempts from its provisions various categories of signs, including, among others,

> Temporary display posters, without independent structural support, in connection with political campaigns and with civic non-commercial health, safety and welfare campaigns, provided that in R districts such posters shall be removed within 60 days following the conclusion of the campaign [and]
>
> . . . temporary displays of a patriotic, religious, charitable or civic character.[2]

San Francisco has been engaged in litigation for over five years against two billboard companies (one of which is Appellant Metromedia, Inc.). That litigation seeks the removal of the off-site advertising signs which are located in the above-mentioned freeway and Market Street sign districts. The defendants in that litigation own approximately 1,000 off-site advertising signs in San Francisco,[3] approximately eighty of which are located in the freeway and Market Street sign districts. Although San Francisco's sign ordinance is not a

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(footnote continued from previous page)
parks and recreational facilities; Civic Center area; Candlestick Park area; areas near freeways where the sign is primarily to be viewed traveling on the freeway; certain designated scenic streets; areas near rapid transit routes; on and near Market Street from the Embarcadero to the Central Skyway Overpass; in Jackson Square; on and near Market Street from the Central Skyway Overpass to Diamond Street.

[2] City Planning Code (Part II, Chapter II, San Francisco Municipal Code) Section 603. That section also exempts, among others, official public notices, government signs for traffic control, commemorative plaques, and religious symbols.

[3] San Francisco's jurisdictional boundaries contain approximately forty-nine (49) square miles of land area.

"total ban" on billboards, defendants there have raised numerous defenses involving constitutional issues, including the free speech and due process claims asserted by Appellants in this case.

In the November, 1977, San Francisco municipal election, a declaration of policy calling for the total ban of billboards[4] was submitted to the San Francisco voters by their Board of Supervisors. That ballot measure was rejected.

San Francisco's interest in this litigation stems in part from the possibility that the people of San Francisco may yet decide, either directly or through their elected representatives, to adopt legislation which will eventually eliminate billboards altogether within the city. San Francisco's primary concern, however, is that the arguments advanced by Appellants, if accepted by this Court, will seriously impair, if not entirely defeat, our ability to enforce our present off-site advertising regulations.

This brief is submitted pursuant to Supreme Court Rule 36.4. San Francisco has read the briefs submitted by Appellee (hereinafter, "San Diego") and by Amicus Curiae City of Alameda in support of San Diego. San Francisco agrees with the positions taken in those briefs and does not intend to reiterate the arguments contained therein. Rather, the purpose of San Francisco's brief is to demonstrate that Appellants really seek protections for their businesses far beyond those properly afforded by the First and Fourteenth Amendments. The standards of review which Appellants propose for regulation of, as well as a prohibition against, outdoor advertising are unrealistic and fail to balance fairly the competing public and private interests involved.

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[4] That ballot measure, known as "Proposition W," framed the policy question as follows: "Should the Board of Supervisors enact legislation which would phase out those billboards containing off-site advertising over a period allowing full amortization of costs to billboard companies?"

SUMMARY OF ARGUMENT

The importance of this case lies not in the immediate result regarding the validity of San Diego's sign ordinance. Rather, what is at stake here is the ability of states and local governments under the police power to protect the environmental quality of life for their citizens by prohibiting or regulating the blight of billboards.

This case involves a zoning and land use regulation. Appellants would have this Court believe that critical First Amendment issues are presented in this case. However, no one claiming entitlement to, or need for, communication of an idea or concept has come forward to assert that San Diego's ordinance has crippled his exercise of this important right.

Therefore, this Court should not be led into the dangerous maze of legislative inquiry implicit in the strict scrutiny standard of review where fundamental rights are involved. Rather, the standard of review applied by the California Supreme Court should be affirmed by this Court as it poses a workable framework for balancing the competing public and private interests. In determining whether the prohibition against billboards is a permissible time, place and manner regulation, the proper test is whether (1) the regulation is content neutral, (2) it serves a significant governmental interest, and (3) it leaves open ample alternative means of communication.

Finally, the traditional "rational basis" standard of review is the proper test for determining due process claims regarding zoning and land use regulations. The California Supreme Court properly applied this test in upholding San Diego's ordinance. On this ground also, its decision should be affirmed.

ARGUMENT

A. THE TEST FOR REVIEWING FIRST AMENDMENT CLAIMS REGARDING A PROHIBITION AGAINST BILLBOARDS ARTICULATED IN *JOHN DONNELLY & SONS* V. *MALLAR* AND USED BY THE CALIFORNIA SUPREME COURT BELOW FAIRLY BALANCES THE COMPETING PUBLIC AND PRIVATE INTERESTS IN DISSEMINATING AND RECEIVING INFORMATION, PRIVACY, PUBLIC SAFETY AND A LIVABLE ENVIRONMENT; ACCORDINGLY, THAT TEST SHOULD BE APPROVED AND APPLIED BY THIS COURT.

The central question posed in this case is whether San Diego's billboard ban is a "time, place and manner" regulation having only a constitutionally permissible "incidental effect" on speech. Employing the test adopted in *John Donnelly & Sons* v. *Maller,* 453 F.Supp. 1272, 1277 (S. D. Maine 1978), the California Supreme Court below answered that question affirmatively. (Jurisdictional Statement [hereinafter "JS"] 21a.)

In *Mallar, supra,* the court was faced, not just with a *city-wide* ban on billboards, but a *state-wide* elimination of off-premises, outdoor "billboard" advertising. The *Mallar* court, at 1277, adopted the test previously articulated by this Court in the context of regulation of commercial speech:[5]

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[5] The Maine statute, as described in *Mallar, supra,* at 1276, exempted certain classes of signs, including temporary signs "pertaining to charity drives and political campaigns" as well as signs "erected by churches and civic, historical and cultural organizations and signs which serve public functions." Thus, the Maine statute would allow some of the off-site messages carried on Appellants' signs in San Diego but would prohibit others.

> To constitute a legitimate time, place, or manner restriction, a regulation must satisfy three criteria: (1) the restriction on speech must be "justified without reference to the content of the regulated speech," (2) the restriction must "serve a significant governmental interest," and (3) in so doing, the restriction must "leave open ample alternative channels for communication of the information." *Virginia Pharmacy Board* v. *Virginia Consumer Council* [425 U. S. 748, 96 S.Ct. 1817 (1976); other citations omitted.]

Appellants, although somewhat obliquely, suggest that the test adopted and applied in *Mallar* is inappropriate. Appellants feel that this test is too easy to meet:

> Any effort to destroy an entire medium could be viewed as content neutral; arguably "significant" governmental interests abound; alternative sources may ... always be found in the media which remain .... (Appellants Brief, at 30.)

Instead of the *Mallar* test, Appellants suggest that this Court should strictly scrutinize San Diego's sign ordinance and

> require the *state* [emphasis in original] to demonstrate a significant public interest, furthered by a narrowly-drawn regulation, specifically tailored to accomplish the legislative goal .... (Appellant's Brief, at 36.)

Moreover, "narrowly drawn," according to Appellants, means that "should less restrictive means be available, the [legislative] effort [to regulate or prohibit off-site billboards] must fail." *Id.*

Appellants argue that strict scrutiny is necessary because of "competing constitutional concerns." (Appellants' Brief, at 35 *et seq.*) The cases cited by Appellants, however, are distinguishable or completely inapposite. Appellants cite *Troyer* v. *Town of Babylon,* 483 F.Supp. 1135 (E.D.N.Y. 1980), *aff'd*

mem. sub nom Troyer v. *Town of Southampton,* 628 F.2d 1346 (2d Cir. 1980), *aff'd,* 49 U.S.L.W. 3371 (U.S. November 17, 1980). In that case, which involved a local law prohibiting door-to-door distribution of literature and solicitation without the prior consent of occupants but exempting persons who had resided in or maintained a business in the town for 6 months, the ordinance was held unconstitutional *as applied,* not on its face. *Village of Schaumburg* v. *Citizens for a Better Environment,* 444 U.S. 1162, 100 S.Ct. 826, ____L.Ed. 2d____ (1980) dealt with a local law requiring "charitable" organizations to prove that 75% of funds solicited actually went to charitable uses before they could be allowed to solicit funds door to door. The Court held that this attempt to protect citizens from fraudulent solicitation placed an impermissible burden on the exercise of First Amendment freedoms and that the goal could be accomplished by other means.[6] *Consolidated Edison Co.* v. *Public Service Commission,* ____U.S.____, 100 S.Ct. 2326 (1980) involved an attempt to regulate the content of speech by public utility companies through the prohibition of discussion of "controversial issues" in inserts in billing envelopes. *Carey* v. *Population Services International,* 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977) also dealt with a content regulation, advertisement of contraceptives, and involved an impermissible invasion of the right to privacy.

Appellants also argue that "[s]till more exacting scrutiny" is required because "the San Diego ordinance is not a mere regulation but an absolute prohibition." (Appellants' Brief, at 36.) The California Supreme Court correctly perceived the speciousness of Appellants' argument in pointing out that

[6] Door-to-door distribution and solicitation cases involve one on one encounters where the distributor or solicitor may be turned away at the request of the occupant of a household. The one-on-one intrusion into the peaceful enjoyment of the home is qualitatively different from the intrusion into the peaceful enjoyment of the environment caused by billboards. The residents of the community cannot avoid their intrusion.

Appellants admit "that a ban covering 97 percent of the city is merely a 'regulation,' while the extension of that ban to the remaining 3 percent of the city is a 'prohibition.' " (JS 17a.)

In *Goldblatt* v. *Town of Hempstead,* 396 U.S. 590, 82 S.Ct. 987, 8 L.Ed. 2d 130 (1962), this Court cogently stated at 592,

> It is an oft-repeated truism that every regulation necessarily speaks as a prohibition.

San Francisco respectfully submits that Appellants' contention with respect to the total ban aspect of San Diego's ordinance begs the question of whether speech is impermissibly impaired in this case. This Court has never held that there is a constitutional right to a particular mode of expression or to the most cost-effective means of communication.

An inherent difference between billboards and handbills or door-to-door solicitation is implicit in the third part of the *Mallar* test. A total ban on leafleting or door-to-door solicitation would leave an indigent speaker with no alternative means to communicate his message. On the other hand, ample alternative channels of communication may remain available to any speaker who can afford to pay for billboard advertising. As the *Mallar* court noted, at fn. 10, at 1280, outdoor advertising amounted to a mere 1.2% of the total advertising expenditures nationwide. Moreover,

> *Other forms of print media, which, like outdoor advertising, enjoy the advantage of being relatively low in cost, such as pamphleting and leafleting, lie beyond the scope of the Act altogether, and thus remain available for commercial and noncommercial advertising alike.* In short, the Maine Act clearly leaves open numerous alternative channels for communication of the information now carried by off-premises billboards. It thus meets the third prong of the "time, place or manner" test. (Emphasis added.) *Id.*

Appellants admit that billboard advertising "raises certain problems unique to it." (Appellants' Brief, at 22.) Appellants, however, fail to identify these problems and to discuss the competing public and private interests which this Court must weigh in determining whether San Diego has balanced these interests in a manner consistent with First Amendment protections. For example, Appellants totally ignore the interest in personal privacy which billboards by their very nature invade. This Court has long recognized that billboard advertising relies upon a captive audience, thus invading rights of privacy. In *Packer Corporation* v. *Utah,* 285 U.S. 105, 110, 52 S.Ct. 273, 76 L.Ed. 643, 647 (1931), this Court recognized the intrusive nature of billboards and stated:

> [Billboard] advertisements . . . are constantly before the eyes of observers on the streets . . . to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well as the adults have those of the billboard thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by one who is to see and read the advertisement. The radio can be turned off, but not so the billboard .... These distinctions clearly place this kind of advertisement in a position to be classified so that regulations *or prohibitions* may be imposed upon all within the class . . . . (Emphasis added.)

Appellants urge this Court both to limit the types of governmental interests which may justify such a prohibition so as to exclude aesthetic or environmental concerns and to require a state or local governmental entity to prove that its regulation of their industry is needed to secure its objectives. The imposition of such limitations, however, is neither a necessary device to protect First Amendment freedoms nor a prudent method for balancing competing interests. Moreover, the second prong of the *Mallar* test, requiring the regulation to serve a significant governmental interest, strikes a fair balance between the competing interests of public safety and privacy as

well as environmental concerns on the one hand and the interests of disseminating and receiving information on the other.

Appellants do not dispute that aesthetics is a legitimate state interest; instead, they imply that aesthetics is not a significant governmental interest because "aesthetic judgments relate to matters of taste, tone and mood." (Appellants' Brief, at 44.) Appellants' claim should be rejected for the following reasons:

First, the fact that a legislative proscription arises out of a debatable legislative judgment does not mean that the governmental interest to be served by that judgment is any less significant. If such were the case, even safety regulations would not serve significant governmental interests because such regulations as speed limits and minimum age for operating automobiles necessarily require the exercise of judgment with which reasonable persons may differ.

Second, in holding "that the preservation and promotion of aesthetic standards do serve as an adequate basis for comprehensive anti-billboard legislation", the *Mallar* court recognized, at 1278,

> The nation's recently-awakened and growing concern for the quality of its environment and the various and widespread steps taken by individuals, citizen groups, and governmental bodies to protect and enhance natural resources demonstrate beyond reasonable question that the Maine Act serves substantial governmental interests through the preservation of aesthetic values.

See also *Berman* v. *Parker*, 348 U.S. 26, 33, 75 S.Ct. 98, 102, 99 L.Ed. 27 (1954), quoted with approval in *Mallar, supra,* at 1278.

Third, even the billboard industry itself recognizes that its structures may adversely affect the environment in which they are located. In its amicus curiae brief filed in support of

Appellants, Outdoor Advertising Association of America (OAAA) admits that the industry

> [has promulgated] a code of recommended practices which recognizes the importance of locating outdoor advertising signs only in commercial and industrial areas, and support[s] ... federal, state and local regulations which implement that policy. (Amicus Brief of OAAA, at 1.)

OAAA further stated in their amicus brief that

> 17 counties and 209 cities within [California] have already completely prohibited outdoor advertising. Many of these ordinances have not been directly challenged because they preclude billboards from localities which are particularly scenic or principally residential in character without appreciable commercial or industrial activity. (Amicus Brief of OAAA, at 2.)

The California Supreme Court properly rejected Appellants' argument below that an urban community is entitled to less environmental protection than that afforded a suburban or rural community. It should require no argument that citizens of an urban community are entitled to be spared from blight no less than are the residents of suburbs and rural areas. San Francisco's sign ordinance recognizes the importance of preserving the beauty and distinctive character of our city. Although the promotion of economic and traffic safety interests are included among the stated purposes of San Francisco's sign ordinance, aesthetics and environmental concerns were also primary objectives in the enactment of that sign ordinance.[7]

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[7] San Francisco City Planning Code Section 601 states the purposes of the sign ordinance and provides in pertinent part as follows:

> [I]t is the further purpose of this [ordinance] ... to protect ... the character and dignity of public buildings,

(Footnote continued on following page)

Appellant's arguments with respect to the burden of proof governmental bodies must bear to demonstrate the relationship between the billboard regulation and the objectives sought to be served thereby are even more pernicious than their attempt to limit the types of permissible state interests. While the test employed by the *Mallar* court and the California Supreme Court requires only that the state or city show that sign regulations "serve" a significant state interest, Appellants contend that the government must prove a direct relationship.

Under the *Mallar* test, a trier of fact can easily infer that decreasing the size or number, or eliminating entirely, larger-than-life advertisements serves the interest in freedom from visual pollution,[8] and that the challenged regulation therefore serves a significant governmental interest. Under a "direct relationship" test, billboard companies, like Appellants herein, are given an opportunity to confuse and complicate the issue of aesthetics by offering "expert" opinion on the validity of billboards as "big art."[9] Moreover, since most regulations permit on-site advertising and exempt certain types of off-site

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(footnote continued from previous page)

> open spaces and thoroughfares; to protect the distinctive appearance of San Francisco which is produced by its unique geography, topography, street patterns, skyline and architectural features; . . . .

[8] Indeed, despite Appellants' contentions that billboards may be considered as having artistic merit, it is difficult to imagine how a reasonable person could conclude that a series of 12 by 24 foot structures, irrespective of what is painted on them, is more aesthetically pleasing than a view of such natural and man-made scenic phenomena as the Golden Gate Bridge, Coit Tower, or the San Francisco Bay, to give but a few examples.

[9] Appellants' argument that billboards are "big art" and have won numerous art awards is irrelevant. The art award is for the poster art on the billboards, not for the unsightly billboard structures themselves. San Francisco is unaware of any billboard structures that have won architectural design awards. The sign regulations are not designed to impede the development of pop-art or poster art; rather, they seek to regulate the time, place and manner of off-site advertising.

signs, billboard companies can always claim that unless *all* signs are eliminated, no direct relationship exists between sign regulations and the promotion of aesthetic or environmental interests.

Appellants contend that San Diego has not proved that billboards have caused the death of or serious injuries to motorists. San Francisco submits that Appellants' contentions demonstrate their cavalier attitude towards human life. Traffic accidents often are caused by a combination of a multitude of factors not easily severed and examined one by one to determine which of those factors in fact contributed to the accidents. Under the "direct relationship" test, governmental entities would never be able to enact safety regulations as a preventive measure, but would have to wait until unnecessary injuries or deaths have occurred.

Furthermore, it cannot be seriously disputed that the promotion of the economic well-being of the community and its residents is not a compelling governmental interest. In scenic communities such as San Francisco and San Diego, where tourism is a major industry, a trier of fact may properly infer that the elimination of billboards tends to preserve the natural beauty, and to promote the economic interests, of the community. Under the "direct relationship" test urged by Appellants, whether a particular regulation actually promotes the economic interests of a community must be proved by empirical evidence. It would be virtually impossible for a governmental entity to produce evidence to prove the causal relationship between the presence of billboards and a decrease in the volume of tourist trade.

If this Court were to adopt the "direct relationship" test urged by Appellants, San Francisco respectfully submits that governmental entities seeking to enforce even modest anti-billboard regulations must face serious, if not insurmountable, difficulties in proving the validity of those regulations.

Finally, Appellants suggest that no regulation of billboards can be upheld if "less drastic" means of achieving the governmental interest can be conceived. The *Mallar* court, in

requiring only that the state show that "ample means of communication" remain available, implicitly recognized the inappropriateness of the "least drastic means" test. Indeed, under the test advocated by Appellants, the numerous suburban and rural communities which have never permitted billboards within their jurisdictions would now, for the first time, be required to amend their laws to allow off-site advertising. Moreover, in jurisdictions which permit off-site advertising but restrict the size, height, and density of billboards, courts would be asked to adjudicate such unanswerable questions as whether the governmental interest in promoting safety is served by a size limitation which is less than the standard size (12 by 24 feet) billboard.

The problems inherent in employing the least restrictive means test are perhaps most readily apprehended in the context of a regulation governing the density of signs. For example, if a state or local entity determined that off-site advertising signs should be located no less than 1,000 feet apart, such a regulation may be upheld under the *Mallar* test so long as the regulation is content neutral, serves significant governmental interests and affords ample alternative means of communications. See *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 65, 96 S.Ct. 2440, 49 L.Ed. 2d 310 (1976). Under the "least restrictive means" test, the governmental entity must show that the interests served by the 1,000 feet limit could not be achieved by a spacing limitation of 200 or 500 or 999 feet. Such judgments are, of course, debatable; and the judiciary has traditionally and wisely refrained from substituting its judgment for that of the legislature.

Furthermore, as San Diego emphasized, any distinction between the standard of review applicable to a prohibition and that applicable to a regulation is ludicrous. Using the example above (a 1,000 feet spacing limitation), a billboard company could assert that such a limitation diminishes the kind of exposure which, according to amicus curiae OAAA, produces

the cost-effectiveness that makes billboard advertising so desirable. (See OAAA Brief, Appendix.)

Thus, it is clear that the "least drastic" means test is unrealistic and provides protections to the billboard industry which are not afforded by the First Amendment to other communications industries. That test should be rejected by this Court.

In view of the foregoing, it is respectfully submitted that the correct standards for reviewing First Amendment claims regarding prohibitions on, as well as regulations of, off-site advertising are embodied in the three-pronged test applied by the *Mallar* court and the California Supreme Court below. Those standards should be adopted by this Court in this case.

B. THE CALIFORNIA SUPREME COURT CORRECTLY APPLIED THE *MALLAR* STANDARD OF REVIEW TO APPELLANTS' FIRST AMENDMENT CLAIMS REGARDING PROHIBITION AGAINST BILLBOARDS.

1. The California Supreme Court Correctly Determined that San Diego's Regulation Is Content Neutral.

Appellants' contention that the San Diego sign ordinance seeks to regulate the content of speech because it distinguishes between off-site and on-site advertising is wholly without merit. The provisions of the San Diego sign ordinance do not prohibit any particular message. Enforcement of the ordinance will eliminate billboards, but it will not prohibit the transmission or receipt of the messages contained on those structures. The distinction between off-site and on-site advertising is no more than a limitation on the place where particular messages may be transmitted. Appellants and their amici curiae urge this Court to extend the protection of the First Amendment afforded to speech itself, to the billboard structures, the medium.

Moreover, the fact that the San Diego ordinance includes certain exemptions for off-site advertising does not mean that

the ordinance seeks to regulate the content of the messages. More extensive exemptions were noted in the Maine statute in *Mallar, supra.* Despite those exemptions, the court there determined that the Maine Act did not purport to "prohibit the transmission of any particular message" and the purpose and effect of that statute was "to eliminate off-premises advertising." *Mallar, supra,* at 1277.

Accordingly, it is clear that a prohibition against billboards is not a regulation of the content of speech but is rather a content-neutral "time, place and manner" regulation. The fact that the billboard industry sells media rather than meat balls should not entitle it to any greater protection under the First Amendment than is afforded Campbell Soups.

2. The California Supreme Court Properly Concluded that San Diego's Ordinance Serves A Significant Governmental Interest.

The California Supreme Court held that the San Diego ordinance "serves significant governmental interests—promoting traffic safety and improving the appearance of the community—unrelated to the suppression of free expression." (JS 22a.) Appellants do not dispute that traffic safety is a significant governmental interest. Rather, Appellants argue that San Diego failed to prove a direct relationship between traffic safety and the prohibition against billboards. Under the *Mallar* test, however, Appellant's admission that billboards are designed to, and do, attract motorists' attention away from the road (C. T. 145-146, 488-489) provides a constitutionally sufficient foundation for the conclusion that San Diego's ordinance promotes the significant governmental interest in traffic safety.

Furthermore, if this Court accepts the "emerging majority position" that the "preservation and promotion of aesthetic standards do serve as an adequate basis for anti-billboard legislation" *(Mallar, supra,* at 1278, and cases cited therein), this Court must uphold the determination of the California

Supreme Court that San Diego's ordinance serves that governmental interest. Appellants themselves do not raise insufficiency of evidence on this issue. [10]

3. In Light of the Limited Construction Given to San Diego's Ordinance by the California Supreme Court, the Court Below Properly Concluded that the Ordinance Allows Ample Alternative Means of Communication.

Although the San Diego sign ordinance does not define off-site advertising, the California Supreme Court narrowly construed the term, "off-site advertising," by adopting the definition of that term in California Revenue and Taxation Code Section 18090.2:

> a rigidly assembled sign, display, or device permanently attached to a building or other inherently permanent structure constituting, or used for the display of, a commercial or other advertisement to the public.

This Court has consistently stated that it is not within its province to construe and narrow state laws. See *Grayned* v. *City of Rockford*, 408 U.S. 104, 110, 92 S.Ct. 2294, 2302, 33 L.Ed. 2d 222, 228 (1972).

Appellants rely heavily on San Diego's stipulation that

> [m]any businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitally [*sic*] expensive (JS 126a.)

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[10] In fact, the paucity of evidence in the record regarding the arbitrary nature of this regulation speaks eloquently for Appellants' consuming obsession with a plethora of compelling interests and cognate standards of review where the presumption in favor of legislation is abandoned and government is put to the oftimes stygian task of gainsaying the billboard companies' paid "expert."

to support their contention that the California Supreme Court erred in finding that ample alternative means of communication remain available to advertisers in San Diego. In light of this limited construction of the ordinance, however, Appellants' reliance on San Diego's stipulation is misplaced.[11]

That the construction given by the California Supreme Court substantially narrows the application of San Diego's ordinance is readily apparent. The ordinance as written permits numerous means of off-site advertising, including, among others, bench signs at designated public transit bus stops, signs located within malls, courts, arcades, porches, patios and similar areas where such signs are not visible on the boundaries of the premises, buses and taxi-cabs, licensed commercial vehicles, temporary off-premise subdivision directional signs and temporary political campaign signs. (JS 111a-112a.)[12] As interpreted by the California Supreme Court, however, the ordinance will permit, in addition to the exemptions listed in the ordinance, all outdoor advertising signs not permanently affixed to a building or permanently attached to the ground. Therefore, the California Supreme Court properly concluded that the San Diego ordinance, as construed, provided ample alternative means of communication.

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[11] The stipulation itself is puzzling if not devoid of any meaningful content. It is stated in the most conclusory language: the terms "insufficient" and "inappropriate" are inherently vague, and Appellants do not attempt to explicate them. This Court's disposition of transcendental constitutional questions must not be muddled or manipulated by the happenstance of artfully or vaguely drafted stipulations between two adversaries with something less than the exegesis of the United States Constitution in mind.

[12] Since the ordinance was attacked on its face, the California Supreme Court was not persuaded by the vague and conclusory stipulation concerning the lack of alternative means of communication. Given the numerous alternative means for off-site advertising provided under the exemptions in the San Diego ordinance, Appellants and their Amici Curiae's claim that the California Supreme Court addressed this issue in a cavalier manner is at best hyperbole and at worst down-right dishonesty.

In view of the foregoing, it is respectfully submitted that the San Diego ordinance meets the tripartite test for a time, place and manner regulation. The California Supreme Court correctly applied that test in this case and its decision should be affirmed.

C. THE TRADITIONAL "RATIONAL BASIS" STANDARD OF REVIEW IS THE PROPER TEST FOR DETERMINING DUE PROCESS CLAIMS REGARDING ZONING AND LAND USE REGULATIONS.

Appellants claim that the California Supreme Court erred in three distinct ways in upholding the ordinance: first, the court attached a presumption of validity to the ordinance; second, the court failed to consider whether less restrictive means were available to achieve San Diego's asserted goals; and, third, the Court failed to find a violation of due process rights even though the ordinance effectively eliminated Appellants' business as it is presently conducted. See Appellants' Brief, at 34. In essence, Appellants urge this Court to employ a strict scrutiny test in reviewing an ordinance which is a land use and zoning regulation.

It is settled that a presumption of validity favors legislation and that if any facts could reasonably be presumed to support the legislative judgment, the statute will be upheld. *Goldblatt* v. *Town of Hempstead, supra*; *Village of Belle Terre* v. *Boras,* 429 U.S. 252, 94 S.Ct. 1536, 39 L.Ed. 2d 797 (1974). This presumption has less force when the ordinance regulates expression. *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 215, 95 S.Ct. 2268, 2276, 45 L.Ed. 2d 125 (1975).

As fully demonstrated by San Diego, San Francisco, and amicus curiae City of Alameda, the ordinance is a content neutral zoning regulation with only incidental effects on free speech; therefore, the presumption of validity remains. The record is devoid of any evidence showing that Appellants had overcome this presumption of validity. The California Supreme

Court was compelled to defer to the legislative judgment once substantial public interests were perceived and a rational relationship between those interests and the regulations was identified. The California Supreme Court applied the proper test correctly in this case, and its decision should be affirmed.

The second claim for invalidity is based on the alleged First Amendment issues and is no more than a reiteration of the strict scrutiny test advocated by Appellants. Since the California Supreme Court concluded that the San Diego ordinance was content neutral, it correctly refused to apply the test urged by Appellants. This Court should affirm the decision below.

Under the banner of the First Amendment, Appellants seek to resurrect the outmoded and disfavored doctrine of substantive due process in the context of business regulation. That myopic conception of legislative prerogative, given its final and most extreme application in *Schechter Poultry Corp.* v. *United States,* 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570 (1935), was set to rest in *NLRB* v. *Jones and Laughlin Steel Corp.,* 301 U.S. 1, 57 S.Ct. 119, 81 L.Ed. 893 (1937). Since then, this Court has consistently and repeatedly declined any invitations to engage in the type of nitpicking analysis that Appellants, by invoking the First Amendment shibboleth, attempt to foist upon this Court. See *Heart of Atlanta Motel* v. *United States,* 379 U.S. 241, 258-259, 83 S.Ct. 348, 13 L.Ed. 2d 258 (1964) and *United States Railroad Retirement Board* v. *Fritz,* ____U.S.____ C.C.H. B311, Docket No. 70-870, decided December 9, 1980.[13]

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[13] Although these decisions were written in other contexts, i.e., the commerce clause power of the U.S. Congress and equal protection safeguards embodied in the Due Process Clause of the Fifth Amendment, the separation of powers principle on which they are founded has equal application in the instant case. The analysis in these cases is founded on and moves from the premise that the legislature is most competent to identify problems and develop solutions to them.

San Diego's sign ordinance, like any other exercise by the state of its police power, should be afforded the broadest deference by the judiciary. Appellants are corporate enterprises selling access to a medium of communication. They do not have a message to communicate. The City of San Diego, provided that it has a basis in reason for prohibiting billboards, should be able to apply that regulation to media merchants in the same manner that it may prohibit pig farming within its city limits. San Francisco has fully analyzed the free speech issues within the framework of the body of law interpreting the First Amendment in the previous section and has set forth ample reasons why this Court should reject the least restrictive means test.

Finally, while Appellants claim that the California Supreme Court erred in determining that there was no due process violation because the ordinance would eliminate their business as presently conducted, Appellants utterly fail to discuss the issue of whether the prohibition is so complete as to effect a taking of property.[14] Instead, Appellants attempt to append the First Amendment rights of their advertisers to give the billboard industry a due process claim. See Appellants' Brief, 26-41.

Appellants argue that because the San Diego ordinance is an absolute prohibition, it must be strictly scrutinized by this Court. The cases cited by Appellants in support of this argument are not apposite.[15]

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[14] The due process issues related to amortization are raised in San Diego's Conditional Petition for Writ of Certiorari filed with this Court in August, 1980. This Court has taken no action on that Petition as of the time of this writing.

[15] *Talley* v. *California*, 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559 (1960) involved an ordinance which prohibited the distribution of handbills at any time, anywhere, unless the names and addresses of those who prepared, distributed or sponsored them were filed with officials. *Cantwell* v. *Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed.

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Appellants found their due process claim on the ground that the California Supreme Court upheld the ordinance on the basis of two governmental interests—traffic safety and aesthetics—and contend that those interests are insufficient to stand muster under the strict scrutiny standard of review. See Appellants' Brief, at 41. Appellants rely almost exclusively on Pennsylvania cases holding that

> a zoning ordinance which totally excludes a particular business from an entire municipality must bear a more substantial relationship to the public health, safety, moral and general welfare than an ordinance which merely confines that business to a certain area in the municipality. *Exton Quarries, Inc.* v. *Zoning Board of Adjustment*, 425 Pa. 43, 59-60, 228 A.2d 169, 179 (1967).

The language "more substantial relationship" is antithetical to the concept of a system of laws rather than of man. A constitutional rule of law founded on the vague contours of the comparative and superlative hardly promotes a workable rule of law. The words "more substantial" fail totally to articulate standards to be followed by legislatures in the enactment of statutes, and by courts in reviewing statutes.

Aside from the First Amendment issues, Appellants fail to provide any support for their contention that the traditional rational basis test should be discarded by this Court in favor of

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1213 (1940), *Lovell* v. *Griffin*, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938), *Schneider* v. *State*, 308 U.S. 147, 67 S.Ct. 146, 84 L.Ed. 155 (1939) and *Saia* v. *New York*, 334 U.S. 58, 68 S.Ct. 1148, 92 L.Ed 1574 (1948) are all cases involving ordinances which prohibited door to door solicitation without a permit. As pointed out by Justice Rehnquist in his dissenting opinion in *Village of Schaumburg* v. *Citizens, supra*, at 100 S.Ct. 838, a majority of these decisions turned primarily, if not exclusively, on the broad discretion vested in municipal authorities to grant or deny permits on the basis of vague or even non-existent criteria. None of those factors is present in this case.

a more stringent test in its review of San Diego's sign ordinance. Appellants' argument, if given any force by this Court, would effectively destroy any local government's ability to meet the changing social and economic needs of its citizens through land use regulation. For example, a developing town would be unable to exclude a stockyard simply because it has existed for a long time despite a legislative determination after a careful balancing of the various public interests that it has become undesirable.

Based on the foregoing, it is respectfully submitted that the California Supreme Court properly rejected Appellants' argument that a "more substantial" relationship between the exercise of the police power and the public health, safety, morals and welfare must be shown where the police power is exercised to prohibit a business which was not considered a public nuisance under the common law. Its judgment should be affirmed.

CONCLUSION

The ordinance before this Court is a zoning regulation with only an incidental effect on the free exercise of speech. It is clearly a time, place and manner regulation and no more. The three-prong test employed by *Mallar, supra*, is more than sufficient to safeguard the First Amendment rights of those who wish to use off-site advertising. The test urged by the Appellants is one which this Court has traditionally reserved for reviewing ordinances which allegedly infringed upon the exercise of speech or the right to receive information or which allegedly discriminated on the basis of the content of information. No such claim can be made by Appellants in this case. This Court has never held, and should not now so hold, that mere time, place and manner regulation should be subjected to strict scrutiny. Moreover, Appellants' due process claim is meritless and should be rejected.

In view of the foregoing, it is respectfully submitted that the decision of the California Supreme Court is correct and should be affirmed.

Dated: December 23, 1980

Respectfully submitted,

GEORGE AGNOST
City Attorney
BURK E. DELVENTHAL
DIANE L. HERMANN
ALICE SUET YEE BARKLEY
Deputy City Attorneys

Attorneys for Amicus Curiae
City and County of San Francisco

No. 80-195

In the Supreme Court of the United States

OCTOBER TERM, 1980

METROMEDIA, INC., ET AL., APPELLANTS

v.

CITY OF SAN DIEGO, ET AL.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

F. KAID BENFIELD
EDWARD J. SHAWAKER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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v.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTIONS PRESENTED

1. Whether a municipal ordinance, adopted to improve the appearance and economic condition of the city and to promote traffic safety, that generally bans the construction or maintaining of billboards advertising activities occurring off the premises on which the billboards are located, violates the Fourteenth Amendment because it is in excess of the city's police power.

2. Whether such an ordinance, when construed to apply only to billboards and comparable permanent structures used for the display of commercial or other advertising to the public, is invalid on its face under the First Amendment, even though the highest court of the State contemplated that particular applications of the ordinance could be challenged where an advertiser can demonstrate that he has no reasonable alternative means of proclaiming his message to the public.

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INTEREST OF THE UNITED STATES

At stake is the validity of a municipal ordinance which generally bans commercial billboards within the City of San Diego, California. By enacting a community-wide ban on billboards, San Diego joined a trend embracing many jurisdictions—including some 100 localities in California, and the entire States of Hawaii, Maine and Vermont. Congress has, in some measure, encouraged this trend by requiring the states to eliminate billboards from areas adjacent to certain highways constructed with federal funds or to forfeit a percentage of those funds. Highway Beautification Act of 1965, Pub. L. No. 89-285, 79 Stat. 1028, 23 U.S.C. 131.[1] The validity of the federal billboard program is not directly involved in this case because appellants seek to erect or maintain billboards only in commercial or industrial zones of the City—areas which the federal Act largely leaves to state regulation. 23 U.S.C. 131(b). Nevertheless, the decision in this case may have a substantial impact on various aspects of the federal program.[2]

STATEMENT

1. Ordinance No. 10795 (San Diego Cal. Municipal Code §§ 101.0700-101.8702 (1972); J.S. App. 104a-118a) was adopted by the San Diego City Council in 1972. It generally bans all "outdoor advertising display signs" throughout the City except those signs that advertise

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[1] The federal government also has banned billboards on federal lands (43 C.F.R. 2921.0-6(a)). Congress' control of the use of its own land under the Property Clause of the Constitution (Art. IV, § 3, Cl. 2) is not implicated in this case.

[2] The Interstate System and primary system of highways receiving federal aid are described in 23 C.F.R. 470.105(a) and (b). See also 23 C.F.R. 470.107. These two systems comprise about eight percent of all highways in the United States and most of the major interstate highways. Federal Highway Administration, U.S. Department of Transportation, *Highway Statistics—1979* 106, 139 (1980).

goods produced or services rendered on the premises upon which the sign is located or identify the owner or occupant of the premises (§ 101.0700B; J.S. App. 107a). The term "outdoor advertising display signs" is not defined in the ordinance. However, the Supreme Court of California adopted a narrow construction of the term that limits coverage to " 'rigidly assembled, * * * permanently affixed' " signs or structures " 'constituting, or used for the display of, a commercial or other advertisement to the public' " (J.S. App. 4a n.2).[3] In the court's view, this construction fulfills the City's evident purpose of banning billboards and similar permanent structures used predominantly for commercial advertising, without touching signs of a "very different" character such as "a picket sign announcing a labor dispute or a small sign placed in one's front yard proclaiming a political or religious message" (J.S. App. 4a n.2).

In addition to the general exclusion of outdoor advertising signs relating to activities on the premises, the ordinance contains a number of specific exceptions for other types of displays: government signs; bench signs located at public transit stops; commemorative historical plaques; religious symbols; signs located in shopping malls; signs designating the premises for sale or lease; certain advertising on vehicles; signs depicting time, temperature, and news; and temporary political campaign signs (§ 101.0700F; J.S. App. 111a-112a).[4] All

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[3] The definition adopted by the California Supreme Court, drawn from the state tax code, provides in full that an "outdoor advertising display" is " 'a rigidly assembled sign, display, or device permanently affixed to the ground or permanently attached to a building or other inherently permanent structure constituting, or used for the display of, a commercial or other advertisement to the public' " (J.S. App. 4a n.2, quoting Cal. Rev. & Tax. Code § 18090.2 (West 1970)).

[4] The ordinance, as originally adopted in 1972, did not contain the exception for political signs. That exception was added by an amendment in 1977 (J.S. App. 3a n.1). The California Supreme Court concluded (*ibid.*) that this amendment may have been prompted by the Ninth Circuit's decision in *Baldwin* v. *Redwood*

existing nonconforming signs are to be removed in accordance with an abatement schedule that takes into account the original cost of the sign and the number of years it has been standing (§ 101.0700D; J.S. App. 108a-109a); but see note 9, *infra*.

2. Appellants Metromedia, Inc. and Pacific Outdoor Advertising Co., Inc., two advertising companies that own a substantial number of billboards in San Diego,[5] challenged Ordinance No. 10795 in California Superior Court on a number of grounds. All of the billboards owned by appellants that are subject to removal under Ordinance No. 10795 are located in areas of the City zoned for commercial and industrial purposes (J.S. App. 123a), which comprise approximately three percent of the total area of the City (*id.* at 121a). Even prior to adoption of Ordinance No. 10795 in 1972, billboards were not permitted in areas of the City zoned for other purposes (J.S. App. 17a).[6]

Prior to trial in the Superior Court, the parties stipulated to certain facts respecting the outdoor advertising industry and the effects the ordinance would have on appellants' advertising business in San Diego (J.S. App.

City, 540 F.2d 1360 (1976), cert. denied, 431 U.S. 913 (1977), which held unconstitutional a local ordinance imposing stringent restrictions on political signs.

[5] The Joint Stipulation of Facts entered into by the parties states that each of the appellants owns "a substantial number of outdoor advertising displays (approximately 500 to 800) in the City of San Diego" (J.S. App. 122a).

[6] This parallels a similar distinction contained in the federal Highway Beautification Act of 1965, 23 U.S.C. 131. The federal Act requires the states to maintain effective control of outdoor advertising displays adjacent to highways in the Interstate System and primary system as a condition of receiving their full share of federal funding for those systems. Although the states generally must prohibit such displays within 660 feet of the right-of-way (and beyond that to the limits of visibility in nonurban areas) 23 U.S.C. 131(b), displays may be permitted within 660 feet of the right-of-way, subject to certain limitations, in areas of the state that are

123a-127a). Outdoor advertising is presented in two basic standardized forms—a "poster panel," measuring 12 x 24 feet, on which a pre-printed message is posted in sheets, and a "painted bulletin," generally 14 x 48 feet, which contains a hand painted message (J.S. App. 125a). See generally C. Floyd & P. Shedd, *Highway Beautification: The Environmental Movement's Greatest Failure* 21-40 (1979). The billboards are made available to "all-comers" to carry commercial advertising and other messages,[7] and the copy on any particular billboard usually changes each month (J.S. App. 123a). The signs

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zoned for commercial or industrial purposes. 23 U.S.C. 131(d). Appellants have not sought in this lawsuit authorization to construct billboards outside of those sections of San Diego that are zoned for commercial and industrial purposes (see Br. i (Question 1), 29, 33); they seek only the invalidation of Ordinance No. 10795, which has the effect of extending to commercial and industrial areas the ban on billboards that existed elsewhere in the City prior to 1972. Thus, this case does not involve a challenge to a state law or local ordinance, enacted to comply with the requirements of the federal Act, that eliminates billboards adjacent to the right-of-way of Interstate or primary highways in nonurban areas or in residential or other noncommercial and nonindustrial areas of a city or town.

[7] The record does not disclose what percentage of the displays on appellants' billboards are political, social, or similar messages, as distinguished from commercial advertising of goods and services; under what circumstances a fee is charged for noncommercial messages; or what percentage of appellants' revenues is derived from commercial and noncommercial advertising, respectively. In the litigation involving the Maine billboard statute, however, the court found that 24% of the messages carried by one of the plaintiff advertising companies and five percent carried by the other were noncommercial in nature. *John Donnelly & Sons* v. *George N. Campbell, Jr.*, No. 79-1575 (1st Cir. Dec. 22, 1980), slip op. 25. Significantly, the space for the noncommercial messages made available by the former advertiser was largely donated by the company (*id.* at 27 n.13), presumably because the space could not be leased to a paying customer. We note in this regard that, in areas subject to the federal Act, certain exceptions for nonconforming signs may be lost if the signs are abandoned or carry obsolete or no advertising for a certain period. 23 C.F.R. 750.707 (d) (6).

maintained by the outdoor advertising industry seldom advertise goods or services that are sold or made available on the premises on which the sign is located or that are offered by the owner of the sign (*ibid.*). Substantially all of the billboards owned by appellants are located on property leased from others for the purpose of maintaining outdoor advertising displays thereon (*id.* at 122a).

Finally, the parties stipulated that "[m]any businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitally expensive" (J.S. App. 126a). The stipulation does not indicate, however, what meaning the word "many" was intended to convey, either in absolute numbers of companies and individuals or as a percentage of all advertisers, of all purchasers or users of billboard space, or of all displays in place in a given month.[8]

3. On cross-motions for summary judgment, the Superior Court held that the ordinance is an unreasonable exercise of the police power and an abridgement of freedom of speech (J.S. App. 87a, 96a-97a), and it enjoined the City from enforcing the ordinance to prevent appellants from erecting, maintaining, or using their billboards (*id.* at 100a). The California Court of Appeal affirmed on the ground that the ban on billboards is in excess of the City's police power (*id.* at 65a-80a). The Court of Appeals therefore declined to consider appellants' First Amendment and other arguments (*id.* at 80a).

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[8] We note, for example, that in the years 1976 through 1978, only 1.1% of all advertising expenditures were for outdoor advertisements. Bureau of the Census, U.S. Department of Commerce, *Statistical Abstract of the United States* 545 (1979). See also *John Donnelly & Sons* v. *George N. Campbell, Jr.*, No. 79-1575 (1st Cir. Dec. 22, 1980), slip op. 26-27. The stipulation respecting the preference of "many" persons for outdoor advertising therefore would appear to be of little utility in resolving the constitutional questions presented. See also pages 27-29, *infra*.

The California Supreme Court reversed. It first held (J.S. App. 6a-18a) that the elimination of traffic hazards and improving the appearance of the city are proper objectives for the exercise of the city's police power and that the billboard ordinance is reasonably related to these purposes. The court also concluded (*id.* at 18a-26a) that the ordinance, on its face, does not impermissibly abridge freedom of speech in violation of the First Amendment and the state constitution. "The possibility that the ordinance may impede an occasional advertiser from communicating his message to the public," the court reasoned, "is not sufficient to invalidate the ordinance *on its face*" (J.S. App. 23a n.14; emphasis in original). The court noted that "an advertiser retains the ability to assert that, owing to the absence of reasonable alternative means of communication, the ordinance cannot constitutionally *be applied* to prevent him from using a billboard to proclaim his message" (*ibid.*; emphasis in original).

In addition to rejecting appellants' First Amendment and police power arguments, the California Supreme Court sustained the constitutionality of the abatement schedule set forth in the ordinance on its face, but left it open to appellants to show that the amortization period is unreasonably short as applied to some or all of the structures for which they will not otherwise receive compensation (J.S. App. 40a-47a).[9] Appellants have not sought review of the amortization question in this Court.

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[9] On a nonconstitutional issue, the California Supreme Court held (J.S. App. 26a-40a) that the ordinance is preempted by the California Outdoor Advertising Act (Cal. Bus. & Prof. Code §§ 5200 *et seq.* (West 1974)) to the extent it requires removal without compensation of signs adjacent to highways for which state law must furnish compensation as a condition to receipt of federal highway funds. See 23 U.S.C. (Supp. II) 131(g). The City's petition for a writ of certiorari on this question is now pending. *City of San Diego* v. *Metromedia, Inc.*, No. 80-196.

SUMMARY OF ARGUMENT

I

San Diego Ordinance No. 10795, which prohibits commercial billboards and comparable permanent structures used for the display of advertising that does not relate to activities on the premises, plainly is a legitimate exercise of the City's police power. The ordinance was adopted to improve the appearance of the City—and thereby to attract visitors, promote the City's economic well-being, and protect public and private investment in buildings and open space—and to further traffic safety. These are indisputably proper goals for the exercise of the police power. Indeed, this Court long has recognized that billboards pose special problems justifying government regulation.

Elimination of off-premise billboards will permit more peaceful enjoyment of surroundings and improve the environment. Moreover, because, as the California Supreme Court observed, billboards "are intended to, and undoubtedly do, divert a driver's attention from the roadway" (J.S. App. 7a), the San Diego City Council reasonably could conclude that this intended distraction constitutes a traffic hazard. Nor is the validity of the environmental and safety justifications for the ordinance undercut by the fact that the ordinance permits signs advertising goods and services available on the premises. The City reasonably could conclude that these signs do not pose the same environmental and safety problems. In any event, the City was not required to take an all-or-nothing approach.

II

The San Diego billboard ordinance is fully consistent with the First Amendment. Although the ordinance may have the effect of eliminating appellants' *business* of offering advertising space on their billboards, the ordinance does not bar all advertising or expression of ideas through outdoor signs and posters. Therefore, contrary

to appellants' contention, this medium of expression is preserved, but in a manner that prohibits large, permanent signs in order to further important environmental and safety concerns.

A. Billboards present unique problems and cannot be compared to leaflets, door-to-door solicitation, or even the use of sound trucks. Unlike leaflets, the information on billboards cannot be given only to willing recipients, and billboards cannot, like leaflets, be viewed and then neatly discarded out of the view of other members of the public who desire an uncluttered landscape. Although sound trucks may reach unwilling recipients, they are not, like billboards, a permanent fixture of the environment. And given the number, obtrusiveness, and permanence of billboards, it is not fair to suggest that an unwilling viewer simply avert his eyes.

Nor can the erection of billboards along public thoroughfares be compared to the use of sidewalks and parks for assembly and discussion of ideas. Billboards afford no opportunity for the assembly or personal intercourse inherent in the use of parks or sidewalks as forums of expression. Public thoroughfares are constructed with the use of public funds for the far more limited purpose of furnishing a means of transportation.

B. The billboard ordinance is a reasonable regulation of the manner and place of advertising. The ordinance, on its face, leaves untouched reasonable alternatives for advertising, including broadcast and print media, on-premise billboards, temporary and less obtrusive signs and posters on one's property or elsewhere expressing political and other messages, and leafleting. In any event, the California Supreme Court contemplated that individual advertisers who genuinely do not have reasonably available alternatives could bring an action challenging the ordinance as applied.

The ordinance also does not regulate on the basis of content. Although signs offering goods and services for sale on the premises, and offering the premises themselves for sale, are permitted, this is a regulation based

on the *place* of the advertising, not its content. On-premise advertising is a reasonable incident to the use and ownership of the property and is often necessary for the public to locate the merchandise or real estate for sale.

ARGUMENT

I

THE ORDINANCE BANNING BILLBOARDS IS NOT AN UNCONSTITUTIONAL EXERCISE OF THE POLICE POWER

Appellants contend (Br. 33-45) that Ordinance No. 10795 is an unconstitutional exercise of the police power of the City of San Diego. Appellants do not suggest that the City must permit them to place billboards in those areas outside of the City's commercial and industrial zones where they do not now have display signs and where such signs were prohibited even before Ordinance No. 10795 was adopted in 1972.[10] Moreover, they do not argue here, as they did in the California courts (J.S. App. 87a-98a; cf. *id.* at 41a-46a), that the ordinance is in excess of the police power because, although it purports to be regulation to further the public welfare, it results in a taking of their property without just compensation. See *Kaiser Aetna* v. *United States*, 444 U.S. 164, 172, 174-175 (1979). Thus, appellants' argument is that Ordinance No. 10795 exceeds what they perceive to be limitations placed upon the City's police power by the Due Process Clause of the Fourteenth Amendment because it results in a complete prohibition of billboards, and, thereby, the elimination of the outdoor commercial advertising business in the City.[11]

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[10] Thus, as we have noted (see note 6, *supra*), they do not seek to erect or maintain billboards in areas of the City where, if they were within 660 feet of the right-of-way of an interstate highway or primary road, their presence would conflict with the requirements of the federal Highway Beautification Act of 1965.

[11] Actually, appellants contend (Br. 33) that the issue here is whether the police power of the City can be interpreted to authorize

A. The Ordinance Furthers The Substantial Public Interest In Improving The Environment Of The City

The scope of the retained governmental authority of the states—"what traditionally has been known as the police power," *Berman* v. *Parker*, 348 U.S. 26, 32 (1954) —is plenary. The definition of its scope "is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive" (ibid.).

In the present case, the City Council of San Diego adopted an ordinance to further the general welfare by eliminating what was considered to be a visual blight caused by the presence of commercial billboards in the City. Among the stated purposes of the Council in banning these structures were to "preserve and improve the appearance of the City as a place in which to live and work"; "to protect an important aspect of the economic base of the City by preventing the destruction of the natural beauty and environment of the City, which is instrumental in attracting nonresidents who come to visit, trade, vacation or attend conventions"; and to enhance property values and protect public and private investment in buildings and open spaces (§ 101.0700A; J.S. App. 106a).

It is now settled that attainment of aesthetic goals is a proper objective for the exercise of the police power. As the Court stated in *Berman* v. *Parker*, *supra:*

> The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It

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a complete prohibition of outdoor advertising. This characterization of the ordinance is incorrect. On-site advertising is permitted under the ordinance, as is, *e.g.*, advertising on commercial vehicles and benches at transit stops, as well as the display of messages on posters, placards, and temporary signs (see pages 18-20, *infra*).

> is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

348 U.S. at 33; citation omitted. Accordingly, the Court has long recognized the legitimacy of governmental efforts to protect against the "ill-effects of urbanization" (*Agins* v. *City of Tiburon*, No. 79-602 (June 10, 1980), slip op. 5; see also *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 9 (1974); *Village of Euclid* v. *Ambler Co.*, 272 U.S. 365, 394-395 (1926)), including the enactment of "land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city." *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 129 (1978).

Ordinance No. 10795 is reasonably related to accomplishing the aesthetic and environmental goals described above and therefore is well within the reach of the City's police power. See *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 124-125 (1978); *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594-595 (1962). Indeed, this Court has long recognized that billboards pose special problems justifying government regulation. See *Packer Corp.* v. *Utah*, 285 U.S. 105, 110 (1932); *St. Louis Poster Advertising Co.* v. *City of St. Louis*, 249 U.S. 269, 274 (1919); *Thomas Cusack Co.* v. *City of Chicago*, 242 U.S. 526, 529-530 (1917); cf. *Fifth Avenue Coach Co.* v. *City of New York*, 221 U.S. 467, 482-483 (1911). Billboards often stand starkly apart from and out of harmony with their surroundings; in fact, their messages are *designed* to draw the viewer's attention from surrounding sights. As a result, billboards are intrusive upon the private thoughts and sensibilities of those in the proximity, because they are thrust "before the eyes of observers * * * to be seen without the exercise of choice or volition." *Packer Corp.* v. *Utah*, *supra*, 285 U.S. at 110, quoted in *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 302 (1974) (opinion of Blackmun, J.). See also *Lehman* v. *City of Shaker Heights*, *supra*, 418 U.S. at 306-307

(Douglas, J., concurring); cf. *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 748-749 (1978); *Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451, 469 (1952) (Douglas, J., dissenting); *Kovacs* v. *Cooper*, 336 U.S. 77 (1949). Congress made legislative findings to the same effect when it enacted the Highway Beautification Act of 1965, concluding that erection and maintenance of outdoor advertising signs adjacent to highways in the Interstate and primary systems should be controlled in order "to promote the * * * recreational value of public travel, and to preserve natural beauty." 23 U.S.C. 131(a).

Nor is the San Diego ordinance defective because it had the effect of extending a pre-existing ban on off-site billboards to commercial and industrial areas. The City Council reasonably could conclude that residents of or visitors to commercial and industrial areas should be entitled, to the extent possible, to the same benefits of an aesthetically pleasing environment that individuals in other areas enjoy. *John Donnelly & Sons* v. *Mallar*, 453 F.Supp. 1272, 1281 (D. Me. 1978), rev'd on other grounds, *John Donnelly & Sons* v. *George N. Campbell, Jr.*, No. 79-1575 (1st Cir. Dec. 22, 1980). "[T]o conclude that an area is too unattractive to justify aesthetic improvement would be both unreasonable and illogical." 453 F. Supp. at 1282, quoting *John Donnelly & Sons* v. *Outdoor Advertising Board*, 369 Mass. 206, 224, 339 N.E. 2d 709, 720 (1975); see also *E. B. Elliott Advertising Co.* v. *Metropolitan Dade County*, 425 F.2d 1141, 1152 (5th Cir.), cert. dismissed, 400 U.S. 805 (1970).[12] "Urban dwellers, as well as country residents and travelers have an interest in the quality of their surroundings. * * * Moreover, to designate one area as, so to speak,

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[12] This is not to say, of course, that a city could not choose to allow billboards in commercial and industrial zones, as the federal Highway Beautification Act of 1965 permits. The Fourteenth Amendment does not require an all-or-nothing approach. See, *e.g.*, *New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976); *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106, 110 (1949).

second class, might not only inspire complaints, but would tend to impede improvement." *John Donnelly & Sons* v. *George N. Campbell, Jr., supra*, slip op. 18; citations omitted.

The aesthetic goals of the ordinance are not only important in their own right. Improvement of the appearance of the City and preservation of its natural and scenic beauty through elimination of billboards was expected to attract tourists and other visitors [13] and to protect and enhance property values in the area (J.S. App. 106a). Promoting the economic well-being of the community is indisputably a proper governmental function. See *John Donnelly & Sons* v. *George N. Campbell, Jr., supra*, slip op. 14, 16-17. This justification for the ordinance applies equally in commercial and industrial zones: the City Council "might reasonably conclude that just as the scenic beauty of country and coastal areas promotes tourism, improving the aesthetic quality of business districts helps attract new businesses and contributes to general economic development." *John Donnelly & Sons* v. *Mallar, supra*, 453 F. Supp. at 1281-1282; cf. *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 75 (1976) (Powell, J., concurring).[14]

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[13] See *Penn Central Transp. Co.* v. *New York City, supra*, 438 U.S. at 109.

[14] The ordinance also serves to protect the public and private investment in buildings and open space, the value of which may be diminished by the erection or maintenance of billboards. The federal Highway Beautification Act of 1965 was intended to advance a comparable purpose: "to protect the public investment in [interstate and primary] highways." 23 U.S.C. 131(a). The Interstate System, in particular, was designed to harmonize with surrounding natural terrain, and it affords users of the highways a feeling of spaciousness because of the absence of the uncontrolled roadside development that had often plagued other highways. The public investment in aesthetically pleasing highways could be lost through uncontrolled roadside development, perhaps even leading to premature obsolescence of highways because of the diminished value of the land through which they pass. See generally *Safety and Environmental Design Considerations in the Use of Commercial Electronic Variable-Message Signage* 2-3, 22-23, 60-68 (1980), report

B. The Ordinance Is Reasonably Related To The Purpose Of Protecting The Safety Of Pedestrians And Motorists

The City Council also determined that the ordinance would promote the safety of pedestrians and motorists (§ 101.0700A; J.S. App. 106a). Congress made similar legislative findings when it enacted the Highway Beautification Act of 1965, concluding that the erection and maintenance of outdoor advertising signs should be controlled in order "to promote the safety * * * of public travel." 23 U.S.C. 131(a).

We take it as a given, and appellants do not dispute, that the City has a compelling interest in promoting the safety of pedestrians and motorists. But appellants contend (Br. 41-43) that the ordinance is not reasonably related to this objective because the City did not offer evidence of a link between traffic accidents and billboards.[15]

As an initial matter, it must be noticed that it is appellants, not the City, who have the burden of proof with respect to the reasonableness of the ordinance in this regard. *Goldblatt* v. *Town of Hempstead, supra*, 369 U.S. at 596. In any event, as the California Supreme Court observed (J.S. App. 7a), billboards "are intended to, and undoubtedly do, divert a driver's attention from the roadway." Cf. *Ginzburg* v. *United States*, 383 U.S. 463 (1966). The San Diego City Council reasonably

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prepared for the Federal Highway Administration, U.S. Department of Transportation. (We are lodging a copy of this volume, which collects various studies, with the Clerk of the Court). See also S. Doc. No. 6, 90th Cong., 1st Sess. 28-29, 32-34 (1967).

[15] The fact that the City did not identify particular instances in which billboards led to accidents does not undercut the legislative judgment, no doubt informed by common sense, that they do so in a necessarily indeterminate number of cases. Accidents may frequently be caused by a momentary, even subconscious distraction that the individual may not recall (much less disclose) after the trauma of the accident. See generally *Safety and Environmental Design Considerations, supra*, note 14, at 23-46 (collecting safety studies).

could determine that this conceded diversion constitutes a traffic hazard that may lead to accidents in some cases.

A determination as to what measures are reasonably necessary to promote safety inevitably involves weighing and predictive elements and is, as a result, "essentially a matter of public policy, and public policy can, under our constitutional system, be fixed only by the people acting through their elected representatives." *Brotherhood of Locomotive Firemen & Enginemen* v. *Chicago, Rock Island & Pacific* R.R., 393 U.S. 129, 138 (1968). It necessarily follows that, in constitutional adjudication involving the reasonableness of safety legislation such as this, a court may not—as appellants urge this Court to do—"reject the legislative judgment on the basis that without convincing statistics in the record to support it, the legislative viewpoint constitutes nothing more than * * * 'pure speculation.'" 393 U.S. at 139, quoted in *Vance* v. *Bradley*, 440 U.S. 93, 111 (1979). As this Court stated when considering a nearly identical issue in the context of a New York City ordinance banning certain vehicular advertisements:

> The [State court] concluded that advertising on vehicles using the streets of New York City constitutes a distraction to vehicle drivers and to pedestrians alike and therefore affects the safety of the public in the use of the streets. We do not sit to weigh evidence on the due process issue in order to determine whether the regulation is sound or appropriate; nor is it our function to pass judgment on its wisdom. We would be trespassing on one of the most intensely local and specialized of all municipal problems if we held that this regulation had no relation to the traffic problem of New York City. It is the judgment of the local authorities that it does have such a relation. And nothing has been advanced which shows that to be palpably false.

Railway Express Agency, Inc. v. *New York*, *supra*, 336 U.S. at 109; footnote and citation omitted.[16]

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[16] See also *Veterans of Foreign Wars* v. *City of Steamboat Springs*, 195 Colo. 44, 50-52, 575 P.2d 835, 840-841, appeal dismissed,

Appellants contend (Br. 42-43) that the safety rationale is insufficient because signs that are permitted under the ordinance may also interfere with traffic safety. The premise underlying that argument is debatable. Billboards identifying a commercial site or advertising activities occurring there may, in general, be more in harmony with their surroundings and typically are more permanent displays to which motorists might become accustomed over time; the displays carried on appellants' "off-site" billboards, in contrast, ordinarily are changed monthly (J.S. App. 123a-124a), thereby creating a fresh distraction. Similarly, signs on commercial vehicles might reasonably be thought to pose less of a threat to traffic safety because drivers are expected to be paying attention to other vehicles in any event. See *Railway Express Agency, Inc.* v. *New York*, *supra*, 336 U.S. at 110; but see *John Donnelly & Sons* v. *George N. Campbell, Jr.*, *supra*, slip op. 13.

Even assuming the soundness of appellants' factual premise, however, the City of San Diego was not required to take an all-or-nothing approach to billboard regulation. *Railway Express Agency, Inc.* v. *New York*, *supra*, 336 U.S. at 110; *New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976). There are strong countervailing interests in allowing signs identifying or advertising goods sold or activities occurring on the premises that do not exist for appellants' "off-site" billboards. On-premise signs are "in actuality a part of the business itself, just as the structure housing the business is a part of it" (*United Advertising Corp.* v. *Borough of Raritan*, 11 N.J. 144, 150, 93 A.2d 362, 365 (1952) (Brennan, J.), and the City Council could choose to allow such signs as

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439 U.S. 809 (1978); *Newman Signs, Inc.* v. *Hjelle*, 268 N.W. 2d 741, 757, 761 (N.D. 1978), appeal dismissed, 440 U.S. 901 (1979); *Markham Advertising Co.* v. *State*, 73 Wash. 2d 405, 420-422, 439 P.2d 248, 258-259 (1968), appeal dismissed, 393 U.S. 316 (1969); *E. B. Elliott Advertising Co.* v. *Metropolitan Dade County*, *supra*, 425 F.2d at 1151-1152; *Moore* v. *Ward*, 377 S.W.2d 881, 883-884 (Ky. 1964); *New York State Thruway Auth.* v. *Ashley Motor Court, Inc.*, 10 N.Y. 2d 151, 176 N.E.2d 566, 218 N.Y.S. 2d 640 (1961).

an incident to use of the land for the advertised purpose. *Ibid.* On-premise signs often are also essential for informational purposes to enable the motorist to locate the commercial establishment. Signs advertising goods or services offered elsewhere have no such necessary nexus to the property regulated by the ordinance. In addition, the City reasonably might conclude that expression of the owner's own message on his own property is a sufficiently important attribute of ownership to warrant protection in the ordinance,[17] unlike the ability to lease out the same space to others. *Railway Express Agency, Inc.* v. *New York, supra,* 336 U.S. at 115-117 (Jackson, J., concurring).[18]

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[17] Cf. *Pruneyard Shopping Center* v. *Robins,* No. 79-289 (June 9, 1980), slip op. 10-13; *Wooley* v. *Maynard,* 430 U.S. 705 (1977); *Spence* v. *Washington,* 418 U.S. 405, 411 (1974).

[18] Appellants contend (Br. 36-41) that the ordinance is invalid because it results in a complete prohibition of "off-site" billboards, which, in turn, will have the effect of eliminating the outdoor advertising business in San Diego. It is not surprising that appellants have failed to cite a single opinion of this Court or any other federal court supporting the proposition that, for purposes of determining the reach of the police power, there is a constitutionally significant distinction between the "regulation" and "prohibition" of activity deemed to be contrary to the general welfare. See *John Donnelly & Sons* v. *George N. Campbell, Jr., supra,* slip op. 23. In *Goldblatt* v. *Town of Hempstead, supra,* this Court sustained an ordinance that had the effect of prohibiting a beneficial use to which the property had previously been devoted. 369 U.S. at 592. See also *Daniel* v. *Family Security Life Insurance Co.,* 336 U.S. 220 (1949). Appellants do cite (Br. 36-38) this Court's decision in *Young* v. *American Mini Theatres, Inc., supra,* for the proposition that a total ban on activity raises special constitutional concerns. But *Young* and the other decisions of the Court relied upon by appellants all arose under the First Amendment, one of the "specific constitutional limitations" on the exercise of the police power. *Berman* v. *Parker, supra,* 348 U.S. at 32. They do not suggest that there is a general substantive due process limitation on the power of a state or locality to ban an activity in the absence of a "specific constitutional limitation". The First Amendment question in this case is discussed in Part II, *infra.*

Many of the state cases striking down a prohibition on activities within a political subdivision, relied upon by appellants (Br. 38-39), rested on state statutory or constitutional law imposing such

II

ORDINANCE NO. 10795 IS NOT INVALID ON ITS FACE UNDER THE FIRST AMENDMENT

Appellants contend (Br. 18-33) that Ordinance No. 10795 is invalid on its face under the First Amendment because it will eliminate the outdoor advertising business —and with it a particular "medium" of communication— in the City of San Diego. But although the parties stipulated (J.S. App. 126a) that the ordinance will eliminate appellants' billboard *business*, the ordinance does not prohibit all outdoor advertising or expression of ideas by posters or signs. This medium of expression therefore is preserved, albeit in a form restricted in order to advance substantial governmental interests. Further, the record does not show that the information reaching the public will be significantly diminished by the ordinance.

It is important to emphasize once again the nature of the signs appellants contend may not be barred by the City. The California Supreme Court held that "the purpose of the ordinance is the prohibition of commercial billboards" (J.S. App. 4a n.2), and it therefore construed the ordinance as not reaching signs of a different character. Accordingly, the court held that the ordinance bars only permanent structures used predominantly for commercial advertising, but not, *e.g.*, picket signs or small signs in a person's front yard proclaiming a religious or political message.[19] Appellants have stipulated that the

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restrictions on subdivisions. See, *e.g.*, *U.S. Mining & Exploration Natural Resources Co.* v. *City of Beattyville*, 548 S.W. 2d 833 (Ky. 1977); *Gust* v. *Township of Canton*, 342 Mich. 436, 70 N.W.2d 772 (1955); *Reynolds* v. *Vulcan Materials Co.*, 279 Ala. 363, 185 So. 2d 386 (1966); *Township of Andover* v. *Lake*, 89 N.J. Super. 313, 214 A. 2d 870 (App. Div. 1965). To the extent other state court decisions cited by appellants found a general substantive due process limitation under the Fourteenth Amendment on the prohibition of previously lawful activity, they are incorrect.

[19] Appellants therefore are simply wrong in stating (Br. 32) that, under the ordinance, a landowner "may not even use signs on his own land to express his own views on matters not related to his products or services." The California Supreme Court did not

billboards to which the ordinance is directed—and the billboards they maintain—measure either 12 x 24 feet or 14 x 48 feet. Thus, it is clear that this case concerns only large, permanent structures used for the display of advertising—and only such structures that do not identify or relate to activities occurring on the premises where the sign is located.[20]

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purport to delineate the precise range of all the types and categories of on-premise and other signs not reached by the ordinance. It is not clear, for example, whether the ordinance would be construed to permit a corporation or other organization to construct a sign on its own premises proclaiming a political, religious, or other noncommercial message in the same fashion as an individual might do in the front yard of his residence. Cf. *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978). These issues may properly await further development in the state courts, because appellants' signs concededly are within the reach of the ordinance.

In this regard, the Federal Highway Administration (FHWA) issued an advance notice of proposed rulemaking on September 29, 1980, soliciting comments on whether its regulations governing the exception for signs relating to activities occurring on the premises (23 U.S.C. 131(c); see 23 C.F.R. 750.709) should be clarified in their application to noncommercial activities. See 45 Fed. Reg. 64468 (1980). FHWA specifically asked for comments on whether the definition of the term "activity" in the on-premise exemption should be expanded "to allow individuals to erect signs with messages stating their personal views on their own property." *Id.* at 64469. See *Oklahoma ex rel. Dep't of Transportation* v. *Pile*, 603 P.2d 337 (Okla. 1979), petition for cert. pending, No. 79-1617.

There is no occasion in the present case, however, for the Court to consider what messages, if any, the First Amendment might require a state to permit a person to proclaim on his own premises (cf. *Linmark Associates, Inc.* v. *Willingboro*, 431 U.S. 85, 93-94 (1977)), because appellants have conceded (Br. 4-5) that their signs do not fall in the "on-premise" category, even if that category is broadly construed to include signs proclaiming a religious, political, or other noncommercial ~~nature~~ message. Their signs are located on property leased from others for the purpose of erecting billboards, which are in turn made available to third parties for advertising (*ibid.*).

[20] This is not to say, of course, that a ban on smaller, temporary signs would not also be permissible in the context of an ordinance, designed to comply with the federal Act, that did not impose a City-wide ban.

Moreover, the California Supreme Court made clear that, although it sustained the ordinance on its face, it was prepared to entertain an argument that the ordinance could not constitutionally be applied to a particular advertiser who could demonstrate an absence of reasonable alternative means of communicating, such as newspapers, magazines, radio, television, and on-site billboards.[21] The decision below therefore does not foreclose arguments by the unspecified number of persons who appellants claim (Br. 31) use billboards because alternative means of advertising are unduly expensive[22] or inadequate.

A. The Ordinance Furthers Important Governmental Interests And Addresses Unique Problems Posed By Commercial Billboards

In Point I, we have explained how Ordinance No. 10795 furthers the substantial governmental interests

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[21] For example, this case does not involve any claim of a need to display information for motorists regarding the availability of food, lodging, gasoline, and other services along the highway. Cf. *John Donnelly & Sons* v. *George N. Campbell, Jr., supra*, slip op. 9-11. Newspapers, television, radio, and on-site billboards may not satisfy the motorist's need for such information, see, *e.g., Linmark Associates, Inc.* v. *Willingboro, supra*, 431 U.S. at 93, and such information more closely relates to the use of the highway than does, *e.g.*, national brand advertising. *Consolidated Edison Co.* v. *Public Service Comm'n*, No. 79-134 (June 20, 1980), slip op. 1-2 (Stevens, J., concurring). The Highway Beautification Act of 1965 accommodates this interest by directing the Secretary to provide for areas within the right-of-way of highways in the Interstate or primary system where signs "giving specific information in the interest of the traveling public may be erected and maintained." 23 U.S.C. 131(f). See also 23 U.S.C. 131(c)(1), (i), (*o*) and (q). Although the San Diego ordinance does not contain a comparable provision, it should be noted that the need for directional information in urban areas is quite different from that in rural areas where the directional sign provisions of the federal Act have their primary application.

[22] We do not mean to suggest, however, that a state or locality must allow the erection of a billboard merely because it is less expensive than other means of communication. We suggest only that this question may be resolved in the context of a claim by a particular advertiser.

in improving the aesthetic quality of the city, thereby attracting visitors and protecting public and private investment in buildings and open spaces, and in promoting traffic safety. That discussion need not be repeated here. This Court long has recognized the special problems posed by commercial billboards. See page 11, *supra*. And few would question the judgment of the City of San Diego—not to mention Congress, the legislatures of the 50 states, and numerous local jurisdictions—that billboards impair the landscape and disrupt the peaceful enjoyment of the environment. We believe it clear that the First Amendment, as applied to the states through the Fourteenth Amendment, does not bar a locality from pursuing environmental and related objectives in the manner San Diego has chosen.

Appellants concede (Br. 22) that billboards pose unique problems. Nonetheless, comparing this case to those involving leafletting, door-to-door solicitations, and sound trucks, appellants contend (Br. 22-24) that the City could not eliminate all off-premise billboards. But billboards hardly can be compared to these other manners of expression. As the California Supreme Court observed (J.S. App. 24a):

> Unlike leaflets, newspapers, and the like, a billboard is a large, immobile, and permanent structure which like other structures is subject to zoning regulation. The city's right to regulate the commercial use of property, and to ban uses which imperil traffic safety or denigrate the appearance of the community justifies restrictions which go beyond those imposed upon more transitory or less obtrusive media.

It is true that the Court held in *Schneider* v. *State*, 308 U.S. 147, 162 (1939), that a city's interest in preventing litter did not justify an ordinance prohibiting a person from handing leaflets to others willing to receive them; in the Court's view, litter prevention could be accomplished adequately by punishing those who actually throw paper on the ground. But because of their permanent nature, billboards cannot be viewed and then discarded out of the view of those who prefer an uncluttered landscape. Billboards themselves have been determined to be a type of

"litter" on the landscape, and control of that problem necessarily requires a prohibition against their erection in the first place. These aesthetic concerns are unrelated to the suppression of free expression. *Linmark Associates, Inc.* v. *Willingboro, supra,* 431 U.S. at 93-94; *United States* v. *O'Brien,* 391 U.S. 367, 377 (1968).[23]

Likewise, because of their permanent and obtrusive nature, billboards cannot selectively reach only willing recipients of their messages, *Schneider* v. *State, supra,* 308 U.S. at 162, or effectively withhold their messages from those who express a desire not to receive it. *Consolidated Edison Co.* v. *Public Service Comm'n, supra,* slip op. 11 n.11; *Rowan* v. *Post Office Department,* 397 U.S. 728 (1970); *Kovacs* v. *Cooper, supra,* 336 U.S. at 86; *Martin* v. *Struthers,* 319 U.S. 141, 143, 147-148 (1943). Nor can individuals traveling the highways endure only a "short exposure" to billboard displays and then discard them, as they can with bill inserts or leaflets, *Consolidated Edison Co.* v. *Public Service Comm'n, supra,* slip op. 10-

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[23] The Court stated in *O'Brien* that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." 391 U.S. at 376. We do not suggest, of course, that the message carried on a billboard is "symbolic speech" like the burning of a draft card at issue in *O'Brien.* But this cannot obscure the fact that the manner of expression in the present case entails a significant nonspeech element in the erection of a large, permanent structure that, but for the message on its surface, concededly is subject to broad state regulation or prohibition. This nonspeech element, moreover, does not involve personal conduct such as picketing (*Cox* v. *Louisiana,* 379 U.S. 559 (1965)), or the contribution of money (*Buckley* v. *Valeo,* 424 U.S. 1, 16-17 (1976)), that closely identifies the individual with the message he expresses. Nor, in the circumstances of the present case, does the nonspeech element implicate whatever individual autonomy is entailed in the proclaiming of a message on one's person (*Cohen* v. *California,* 403 U.S. 15 (1971); *Tinker* v. *Des Moines School District,* 393 U.S. 503 (1969)) or property (*Linmark Associates, Inc.* v. *Willingboro, supra,* 431 U.S. at 93). See *Young* v. *American Mini Theatres, Inc., supra,* 427 U.S. at 78 n.2 (Powell J., concurring).

11, or turn a dial to avoid the message, as they can with radio and television, *Packer Corp.* v. *Utah*, *supra*, 285 U.S. at 110. And given the proliferation of billboards, it is not fair to suggest that the offended viewer may avoid further bombardment simply by averting his eyes. *Consolidated Edison Co.* v. *Public Service Comm'n*, *supra*, slip op. 11; *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 211 (1975); *Cohen* v. *California*, 403 U.S. 15, 21 (1971).[24]

Nor can the erection of billboards along public thoroughfares be compared to the historical use of parks and streets "for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague* v. *C.I.O.*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.). Billboards afford no opportunity for the assembly or exchange of views inherent in the use of parks and sidewalks as public forums. *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 303-304 (1974) (opinion of Blackmun, J.).[25] As the First Circuit stated,

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[24] Billboards differ from leaflets in another way: they necessarily compete for alternative uses of scarce resources—land adjacent to the highway and the line of sight from the highway. Cf. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 396-400 (1969). The nature of billboards is such that they may disrupt the view and enjoyment of the landscape for a considerable distance, perhaps the entire range over which they can be viewed. For this reason, the mere spacing of billboards appellants urge (Br. 29-30 & n.*, 37-38) may not sufficiently further the important governmental interest in enhancing natural beauty and protection of the environment. See generally C. Floyd & P. Shedd, *supra*, at 95-98.

[25] Justice Douglas observed in his concurring opinion in *Lehman* that "a streetcar or bus is plainly not a park or sidewalk or other meeting place for discussion, *any more than is a highway*. It is only a way to get to work or back home" (418 U.S. at 306; emphasis added). In concluding that the city was not required to carry political advertisements on its buses and streetcars, Justice Douglas reasoned that "[b]us and streetcar placards are in the category of highway billboards" (*ibid.*), and he noted with approval the adoption of state legislation pursuant to the Highway Beautification Act of 1965 "to protect the interests of * * * motorists" by imposing "strict regulation of highway advertising" (418 U.S. at 306; see also *id.* at 307-308, quoting *Packer Corp.* v. *Utah*, *supra*.

"[t]he use of land adjoining the highway for commercial advertising is really the use of the highway itself," and highways are " 'created for a quite different purpose by the expenditure of public money * * *.' " *John Donnelly & Sons* v. *George N. Campbell, Jr., supra*, slip op. 21, quoting *General Outdoor Advertising Co.* v. *Department of Public Works*, 289 Mass. 149, 169, 193 N.E. 799, 808 (1935). *Markham Advertising Co.* v. *State*, 73 Wash. 2d 405, 426-427, 439 P.2d 248, 261-262 (1968), appeal dismissed, 393 U.S. 316 (1969). "As such they are to be distinguished from parks or other facilities created for general use, and weight should be given to the state's right to restrict the state-created incidental benefits" (*John Donnelly & Sons* v. *George N. Campbell, Jr., supra*, slip op. 21-22). Billboard control therefore serves to confine the use of the highways to the purposes for which they are intended and for which the public investment was made. Cf. *Greer* v. *Spock*, 424 U.S. 828, 836-837 (1976). Moreover, appellants can claim no special privilege to engage in their business of outdoor advertising along public thoroughfares. "The streets belong to the public and are primarily for the use of the public in the ordinary way. Their use for the purposes of gain is special and extraordinary and, generally at least, may be prohibited or conditioned as the legislature deems proper." *Packard* v. *Banton*, 264 U.S. 140, 144 (1924); see also *Railway Express Agency, Inc.* v. *New York, supra*, 336 U.S. at 115-117 (Jackson, J., concurring).

For the foregoing reasons, San Diego's ordinance advances significant governmental interests in addressing the unique problems posed by erection and maintenance of commercial billboards.

B. The San Diego Ordinance Is A Valid Regulation Of The Time, Place, And Manner Of Advertising

As this Court has noted, "the right to communicate is not limitless." *Carey* v. *Brown*, No. 79-703 (June 20,

1980), slip op. 14. The exercise of free speech rights—whether the message is commercial or noncommercial [26]

[26] We assume that appellants' billboards and the billboards affected by the San Diego ordinance generally carry a far greater number of commercial messages than noncommercial ones, just as did the billboards involved in the Maine litigation. See note 7, *supra*. The Constitution affords less protection to commercial speech than to other varieties of speech. *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, No. 79-565 (June 20, 1980), slip op. 4-6; *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 455-457 (1978). Based on this distinction, the First Circuit concluded that a state could impose a state-wide ban on billboards carrying commercial messages, at least where there was some provision for on-premise and other signs to inform the motoring public of available travel services. *John Donnelly & Sons* v. *George N. Campbell, Jr., supra*, slip op. 9-11, 20-21, 24-25. The First Circuit struck down the Maine statute, however, because it did not, in the court's view, make adequate provision for display of political, social, cultural, and other noncommercial expression. *Id.* at 25-27.

In arguing that the San Diego ordinance is invalid even as applied to commercial advertisements, appellants rely (Br. 28-29) solely on this Court's decision in *Central Hudson Gas & Electric Co.* v. *Public Service Comm'n*, No. 79-565 (June 20, 1980). But *Central Hudson* involved a flat prohibition on promotional advertising, not a regulation of the manner of its presentation (see slip op. 12-13), and the prohibition was imposed for the purpose of suppressing information in order to affect private economic decisions (*id.* at 1-5, Blackmun, J., concurring; see also *Linmark Associates, Inc.* v. *Willingboro, supra*, 431 U.S. at 96). In the present case, San Diego has not prohibited promotional advertising or sought to suppress its message. The City simply has regulated the place and manner of such advertising. Cf. *Schaumberg* v. *Citizens for a Better Environment*, 444 U.S. 620, 628-632 (1980); *Breard* v. *Alexandria*, 341 U.S. 622, 641-645 (1951); *id.* at 649-650 & n.* (Black, J., dissenting); *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942).

In any event, the San Diego ordinance, as construed by the California Supreme Court, satisfies many of the concerns the First Circuit expressed respecting the effect of the Maine statute on noncommercial messages. The San Diego ordinance applies only to permanent structures in the nature of commercial billboards (J.S. App. 4a n.2) and therefore would appear to permit temporary signs proclaiming political messages of the type that the Maine statute prohibited. *John Donnelly & Sons* v. *George N. Campbell, Jr., supra*, slip op. 26-27. Political campaign signs may be erected three months prior to the election (§ 101.0700F 11, 12; J.S. App. 112a),

—may be limited by reasonable time, place and manner regulation. *Consolidated Edison Co.* v. *Public Service Comm'n, supra,* slip op. 4-5; *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 209 (1975); *Kovacs* v. *Cooper,* 336 U.S. 77 (1949).[27] Such regulation is permissible because "various *methods* of speech, regardless of their content, may frustrate legitimate governmental goals." *Consolidated Edison Co.* v. *Public Service Comm'n, supra,* slip op. 5 (emphasis added). "Independently of the message * * * convey[ed], the form of [a] communication may be offensive—perhaps because it is too loud *or too ugly* in a particular setting." *Id.* at 3 (Stevens, J., concurring; emphasis added); see also *Grayned* v. *City of Rockford,* 408 U.S. 104, 115-118 (1972). In *Kovacs* v. *Cooper, supra,* for example, the Court held that a city could regulate the manner of speech by prohibiting the use on city streets of sound trucks or other amplifying devices emitting "loud and raucous noises." The San Diego ordinance is similar in that it prohibits a manner of speech—commercial billboards—that

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not the mere three weeks allowed under the Maine statute (slip op. 25-26). And finally, although the First Circuit noted (slip op. 26) that the "on-premise" exemption was not available for political messages under the Maine statute, the California Supreme Court made clear (J.S. App. 4a n.2) that an individual can proclaim such messages in a sign on his own premises.

The Highway Beautification Act of 1965 is somewhat broader than the San Diego Ordinance, because the former does not exempt temporary signs or those proclaiming a political message. But because the federal Act allows states to permit signs in commercial and industrial zones, and therefore does not require a state-wide ban, it does not appear to be inconsistent with the First Circuit's opinion. As noted above, moreover, the Federal Highway Administration is considering whether the exception for on-premise signs outside of commercial and industrial zones should include signs proclaiming a personal message of the owner. See note 19, *supra.*

[27] The ordinance manifestly regulates the place and manner of communication. A person may proclaim his message to the public through outdoor advertising on his own premises (J.S. App. 4a n.2; J.S. App. 107a (§ 101.0700B)), but may not proclaim that message on a billboard located elsewhere. And other manners of advertising—radio, television, magazines, newspapers, handbills—are unaffected.

amplifies a message, albeit visually rather than aurally. *Lehman* v. *City of Shaker Heights, supra*, 418 U.S. at 307 (Douglas, J., concurring). For this reason, the City likewise could conclude that billboards would disrupt traffic (336 U.S. at 87 (opinion of Reed, J.)) and interfere with peaceful enjoyment of the environment (*id.* at 81, 87). And, unlike soundtrucks, billboards are permanent fixtures on the landscape.

Of course, to pass muster, a time, place, and manner restriction on expression must serve a significant governmental interest and leave alternative channels for communication and must not be based on the content of the message. *Consolidated Edison Co.* v. *Public Service Comm'n, supra*, slip op. 4-5. As explained elsewhere (see pages 10-17, *supra*), the San Diego ordinance plainly serves significant governmental interests. It is equally clear that the ordinance is constitutional because it leaves available reasonable alternative means of advertising.

Although the parties stipulated that "many" businesses and politicians and other persons rely on billboards to advertise because other forms of advertising are "insufficient, inappropriate and prohibitally expensive" (J.S. App. 126a), such a vague stipulation cannot form the basis for holding the ordinance unconstitutional. We do not know from the stipulation how many persons are in this category or why or to what extent they may regard forms of advertising other than billboards to be "insufficient" or "inappropriate." Surely, for example, an advertiser's own tastes or preference for billboards would not outweigh the important public interest in billboard control where reasonable but marginally less effective alternatives exist. We also do not know how many of the persons who supposedly find other means of advertising "prohibitally expensive" are commercial establishments (or others) who merely do not find other methods of advertising marginally cost effective in particular situations [28] and, on the other hand, how many are individuals

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[28] As pointed out above (see note 8, *supra*) on a national basis, only 1.1% of all advertising expenditures were for outdoor advertising in 1976 through 1978. This indicates that the total

or organizations that do not have the resources to use other forms of advertising even if they wanted to. Only the latter, presumably, could make a compelling case for special consideration.

We note as well that the stipulation regarding alternative methods of advertising was entered into in 1974 (J.S. App. 127a), before the ordinance was amended in 1977 (J.S. App. 3a n.1) to permit temporary political campaign signs. It therefore appears that politicians and those supporting them—one of the groups of noncommercial advertisers for whom appellants express special concern (Br. 7-8, 31)—will have the opportunity to present outdoor advertising. The joint stipulation was also entered into before the California Supreme Court gave the ordinance a narrowing construction to leave untouched signs other than commercial billboards and comparable permanent structures. This construction may permit the erection of smaller or less permanent signs conveying the type of political, social, religious and other noncommercial messages appellants suggest will be affected by the ordinance (see Br. 31-32)—although these noncommercial messages will not be carried on billboards maintained by appellants. And, of course, on-premise commercial advertising is permitted. Thus, although the ordinance might result in the elimination of appellants' advertising *business* in San Diego, it does not bar outdoor advertising or expression of ideas.[29]

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volume of advertising reaching the public will not be significantly diminished by further restrictions on billboards. Moreover, almost two-thirds of this advertising was national, rather than local, in nature. Bureau of the Census, U.S. Department of Commerce, *Statistical Abstract of the United States* 595 (1979). For this type of advertising, as the First Circuit noted, although billboard companies "tout the special qualities of roadside promotion, the dollar statistics and judicial notice both point to ample alternatives." *John Donnelly & Sons* v. *George N. Campbell, Jr., supra,* slip op. 20.

[29] Appellants err in relying (Br. 37-38) on *Young* v. *American Mini Theatres, Inc., supra,* for the argument that the City could not eliminate their advertising business. The opinions of Justice Stevens and Justice Powell observe that the ordinance respecting location of adult movie theatres would have raised a serious ques-

In short, there is no basis for concluding that there are not reasonably adequate means of expression—outdoor displays as well as newspaper, radio, leafletting, etc. —other than appellants' billboards for the vast majority of advertisers whose interests underlie appellants' case. And if there are situations in which there are no reasonable alternatives to proclaiming a message on the type of sign barred by the ordinance, the California Supreme Court indicated that it would entertain the argument that the ordinance could not constitutionally be applied in those circumstances. Accordingly, the ordinance cannot be thought to be a facially invalid time, place and manner regulation because of a supposed absence of reasonable alternative means of expression.

Finally, the San Diego ordinance is not impermissibly based on the content of the particular message that would be displayed; it is the billboard itself that is objectionable. *John Donnelly & Sons* v. *George N. Campbell, Jr., supra,* slip op. 6. Appellants argue (Br. 32) that the ordinance is not content-neutral because it exempts on-site signs and signs advertising the premises for sale, lease, or rent. Contrary to appellants' argument, however, these exemptions are based on the place where the advertising occurs, not its content. Billboards advertisting goods and services may be placed only on premises where the goods are produced or sold or where the services are rendered. Comparable signs offering real estate for sale may be placed only on that real estate and therefore are also a type of on-premise sign.[30]

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tion if it significantly restricted access to the films (427 U.S. at 71 n.35, 77). But what concerned the Court in those opinions was access to the expression (the films), not the place where they are displayed (the theatre). So too here, if the public's access to information now carried on appellants' billboards is not significantly curtailed, access to the particular place of display (the billboards) is not so important.

[30] Other exceptions in the ordinance—*e.g.*, for bench signs at public transit stops, religious symbols, historical plaques, signs on commercial vehicles, and temporary subdivision directional signs

The distinction between on and off-premise signs is firmly rooted in common sense and attributes of property ownership and does not offend the First Amendment. See *Young* v. *American Mini Theatres, Inc., supra*, 427 U.S. at 68 (opinion of Stevens, J.); *Railway Express Agency, Inc.* v. *New York, supra*, 336 U.S. at 109-110. On-premise signs are "in actuality a part of the business itself, just as the structure housing the business is a part of it," *United Advertising Corp.* v. *Borough of Raritan, supra*, 11 N.J. at 150, 93 A.2d at 365 (Brennan, J.), and permitting them is a logical extension of authorizing the business on the property. Moreover, a sign offering goods for sale on the premises, or offering the premises themselves for sale, is often the most effective method of advertising and involves less expense and greater autonomy than other methods. *Linmark Associates, Inc.* v. *Willingboro, supra*, 431 U.S. at 93; *John Donnelly & Sons* v. *George N. Campbell, Jr., supra*, slip op. 19; *Newman Signs, Inc.* v. *Hjelle*, 268 N.W. 2d 741, 758-759 (N.D. 1978), appeal dismissed, 440 U.S. 901 (1979). *Board of Adjustment* v. *Osage Oil & Transp., Inc.*, 258 Ark. 91, 522 S.W.2d 836, cert. denied and appeal dismissed, 423 U.S. 941 (1975); *E. B. Elliott Advertising Co.* v. *Metropolitan Dade County*, 425 F.2d 1141, 1153-1154 (5th Cir.), cert. dismissed, 400 U.S. 805 (1970).[31]

(J.S. App. 111a-112a)—do not appear to be real exceptions at all, in view of the manner in which the California Supreme Court construed the ordinance. They are merely among the general category of temporary or less obtrusive signs that are not covered by the ordinance irrespective of their content.

[31] Amicus ACLU also argues (Br. 13) that the ordinance is content-based because it permits temporary political campaign signs but not other ideological speech. This assertion ignores the California Supreme Court's interpretation of the ordinance as not reaching signs distinct from commercial billboards, including, *e.g.*, signs in one's yard proclaiming a religious or political message.

CONCLUSION

The judgment of the California Supreme Court should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

F. KAID BENFIELD
EDWARD J. SHAWAKER
Attorneys

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